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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1

AMERICAN EXPORT LINES, INC.,

Petitioner,

—against—

GILBERTO ALVEZ and JOSEPH VINAL SHIP MAINTENANCE, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

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IN THE

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No.

AMERICAN EXPORT LINES, INC.,

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—against—

GILBERTO ALVEZ and JOSEPH VINAL SHIP MAINTENANCE, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

Petitioner American Export Lines, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the New York Court of Appeals, entered in this proceeding on April 3, 1979.

Opinions Below

The opinion of Justice Bernard Nadel of the New York State Supreme Court, Special Term, New York County, which denied the plaintiff's motion to amend his complaint to add his wife as a party plaintiff in a cause of action for loss of consortium, is not reported, and is printed in Appendix A, *infra.*

The opinion of the New York State Supreme Court, Appellate Division, First Department, which reversed Justice Nadel's decision and granted the motion to amend the com-

plaint is reported at 59 App. Div. 2d 883, 399 N.Y.S.2d 673 (1st Dep't 1977) and is printed in Appendix B, *infra*. The order of the New York State Supreme Court, Appellate Division, First Department, granting the motion of American Export Lines, Inc. to appeal to the New York State Court of Appeals is not reported, and is printed in Appendix C, *infra*.

The opinion of the New York State Court of Appeals which, in a 5-1 decision, affirmed the decision of the New York State Supreme Court, Appellate Division, First Department, is reported at 46 N.Y.2d 634, 415 N.Y.S.2d 979 (1979), and is printed in Appendix D, *infra*.

Jurisdiction

The judgment of the New York State Court of Appeals was entered on April 3, 1979. This petition for certiorari was filed within ninety days of that date.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3). [See also Supreme Court Rule 19(1)(a).]

Questions Presented

1. When deciding an issue of federal maritime law, should the New York State Court of Appeals be permitted to reject the established decisions of the Second and Fifth Circuit Courts of Appeal, the only federal appellate courts to address the issue of loss of consortium in a personal injury action?
2. Whether the application of the federal maritime law governing this action should be bifurcated, so that one result is mandated for all decisions of the lower New York Courts, while the opposite result can and has been reached by federal courts addressing the same issue?

3. Should an unfair, anomalous, and unnecessary distinction be created between the rights of injured longshoremen and the rights of injured seamen?

Statutes Involved

UNITED STATES CODE, Title 46:

§688 Recovery for injury to or death of seaman

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. [Jones Act]

§762 Amount and apportionment of recovery

The recovery in such suit shall be à fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought. [Death on the High Seas Act]

Statement of the Case

Gilberto Alvez, an employee of respondent Joseph Vinal Ship Maintenance, Inc. lost an eye while working as a lasher aboard the SS EXPORT BUILDER, a vessel owned by petitioner American Export Lines, Inc., on October 13, 1972. He brought suit for negligence and unseaworthiness against the shipowner, which in turn impleaded Joseph Vinal Ship Maintenance, Inc.[1]

Alvez subsequently moved to amend his complaint to add his wife as a party plaintiff in a cause of action for loss of consortium. This motion was summarily denied by Justice Bernard Nadel of the New York State Supreme Court. On appeal, the New York State Supreme Court, Appellate Division, First Department, reversed on the law and granted the motion to amend the complaint. Subsequently, that court granted the motion of American Export Lines, Inc. for leave to appeal to the New York State Court of Appeals, certifying the following question:

> "Was the order of this Court, which reversed the order of the Supreme Court an abuse of discretion as a matter of law?"

The New York State Court of Appeals, in a 5-1 decision, affirmed the New York State Supreme Court, Appellate Division, First Department, and permitted the cause of action for loss of consortium damages to stand, asserting that the federal maritime law on this question was unsettled, thereby permitting it to speculate as to what that law should or might be.

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[1] The employer third-party was impleaded prior to the effective date of the 1972 Amendments to the Longshoremen's & Harbor Workers Compensation Act, 33 U.S.C. §§901 *et seq.*, which, *inter alia*, eliminated the longshoreman's cause of action for unseaworthiness.

REASONS FOR GRANTING THE WRIT

I

The New York State Court of Appeals Rejected the Established Federal Maritime Law on Loss of Consortium as Determined by the Only Two Federal Appellate Courts to Address This Issue.

A. The Landmark Decision of the Second Circuit in *Igneri* Specifically Prohibits the Recovery of Loss of Consortium Damages by the Spouse of an Injured Longshoreman.

Any discussion of the issue of loss of consortium damages in maritime personal injury cases must commence with the landmark decision of *Igneri* v. *Cie de Transports Oceaniques,* 323 F.2d 257 (2d Cir. 1963), *cert. denied,* 376 U.S. 949 (1964). There, Theresa Igneri sought to recover damages for loss of "compensation, support, love, affection and consortium," due to injuries suffered by her longshoreman husband. After an exhaustive review of the authorities, Judge Friendly affirmed the district court's dismissal of the loss of consortium cause of action and held that:

> "[T]he scheme of remedies, statutory and judicial, for injury to such maritime workers limits recovery to the person directly injured." *Id.* at 268.

That federal maritime law refuses to recognize loss of consortium damages in maritime personal injury causes of action has been recognized both prior and subsequent to *Igneri. See Christofferson* v. *Halliburton Co.*, 534 F.2d 1147 (5th Cir. 1976); *Westcott* v. *McAllister Bros.*, 463 F. Supp. 1039 (S.D.N.Y. 1978); *Wetters* v. *Moore-McCormack Lines*, [1977] A.M.C. 1529 (D. Md.); *Sanseverino* v. *Alcoa S.S. Co.*, 276 F. Supp. 894 (D. Md. 1967); *Pruitt* v. *M.S. Rigoletto*, 211 F. Supp. 295 (E.D. Mich. 1962); *Berga-*

maschi v. *Isthmian Lines, Inc.* [1959] A.M.C. 1862 (S.D. N.Y.); *Rogers* v. *City of New York*, 46 Misc. 2d 373, 259 N.Y.S. 2d 604 (Sup. Ct. 1965); *cf.*, *Ivy* v. *Security Barge Lines, Inc.*, 585 F.2d 732 (5th Cir. 1978) (deceased seaman).

The *Igneri* rule, established sixteen years ago, denying recovery for loss of consortium to the spouse of an injured longshoreman, had been consistently followed until some courts, including the court below, mistakenly construed the decision of this Court in *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573 (1974), as having implicitly overruled it. *Gaudet*, however, dealt exclusively with a maritime wrongful death situation, having no direct effect upon the *Igneri* rule.

B. The Decision of This Court in *Gaudet* Has No Applicability to This Longshoreman's Personal Injury Action.

In *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970), this Court created a wrongful death cause of action under the general maritime law. *Gaudet* expanded the *Moragne* wrongful death remedy so as to include a claim for loss of consortium by a widow. The falsity of interpreting *Gaudet* as having any effect on the *Igneri* rule denying recovery in maritime personal injury situations may plainly be seen from even a superficial analysis of the Court's decision in *Gaudet*. Specifically, this Court held:

> "[U]nder the maritime *wrongful death* remedy, the decedent's dependents may recover damages for their loss of support, services, and society, as well as funeral expenses." 414 U.S. at 584 (emphasis added).

No mention was made, nor inference created, that such a holding should be extended beyond the scope of a wrongful death situation. Indeed, this Court paid deference to *Igneri* as an authority against awarding damages for loss of consortium in a personal injury lawsuit by a court of admiralty. *Id.* at 589-90, n. 25. However, *Simpson* v. *Knutson*, 444 F. 2d 523 (9th Cir. 1971) and *In re United States Steel*, 436 F.2d 1256 (6th Cir. 1970), *cert. denied*, 402 U.S. 987 (1971), which had refused to permit a widow to recover damages for loss of consortium, were dealt with succinctly, but nonetheless differently, by this Court:

> "Insofar as [they] are inconsistent with our holding, we disagree." *Id.* at 588, n. 23.

Even though *Gaudet* explicitly overruled *Simpson* and *United States Steel* on this issue, this Court nonetheless felt it necessary to specifically note that these cases were no longer accurate. However, no similar mention was made of *Igneri*. Instead, *Igneri* was cited for the proposition that loss of consortium damages could not be recovered in an admiralty personal injury case. Finally, rather than implicitly recognizing a cause of action for loss of consortium to the wife of an injured longshoreman, *Gaudet* all but explicitly rejects such a notion.

> "Obviously, the decedent's recovery did not include damages for the dependent's loss of services or of society, and funeral expenses. Indeed, *these losses—unique to the decedent's dependents—could not accrue until the decedent's death.*" *Id.* 591-92 (emphasis added).

Since *Gaudet* involved a maritime wrongful death action, and the present case instead deals with a maritime personal injury action, the decision of this Court in *Gaudet* is inapplicable herein, and should not be considered.

C. The Fifth Circuit, the Only Federal Court of Appeals to Consider the Effect of *Gaudet* on Loss of Consortium in a Personal Injury Case, Has Reaffirmed the *Igneri* Rule.

The holding of this Court in *Gaudet* did not imply that recovery would be permitted for loss of consortium arising out of an injury to, but not the death of, a maritime worker:

> "Restricting loss of society to that arising after the death of an injured maritime worker indicates no intention to create an action for loss of consortium under the general maritime law where the husband was not fatally injured." *Christofferson* v. *Halliburton Co.*, 534 F.2d 1147, 1150-51 (5th Cir. 1976).

The *Christofferson* court, the highest court yet to rule on the ramifications of *Gaudet*, clearly reaffirmed the continued validity of *Igneri*. There, far from interpreting *Gaudet* as having overruled *Igneri*, the court rejected the loss of consortium claim, holding that the validity of *Igneri* had not been affected by *Gaudet*, which had "implicitly limited a claim for loss of society to a maritime wrongful death action . . ." *Id.* at 1150. The court relied on the statutory prohibition in the Jones Act against anything but direct recovery by the injured seaman himself in a negligence suit, and on the principle that such a right was also nonexistent under the general maritime law. *See also Westcott* v. *McAllister Bros.*, 463 F.Supp. 1039 (S.D.N.Y. 1978); *Wetters* v. *Moore-McCormack Lines*, [1977] A.M.C. 1529 (D. Md.); cf., *Ivy* v. *Security Barge Lines, Inc.*, 585 F.2d 732 (5th Cir. 1978) (deceased seaman).

Moreover, that *Igneri* was decided at a time when fewer states (25%) recognized a wife's right to loss of consortium than may do so presently (75%), does not in any way affect the continued validity of its rule. As Judge Friendly observed in *Igneri, supra* at 259-60:

> "Maritime law draws on many sources; when there are no clear precedents in the law of the sea, admiralty judges often look to the law prevailing on the land. See Gilmore and Black, Admiralty (1957), §1-16. At least this much is true. If the common law recognized a wife's claim for loss of consortium, *uniformly or nearly so*, a United States admiralty court would approach the problem here by asking itself why it should not likewise do so; if the common law denied such a claim, *uniformly or nearly so*, the inquiry would be whether there was sufficient reason for an admiralty court's nevertheless recognizing one." (emphasis added) (citations omitted).

Indeed, the court in *Christofferson, supra* at 1150, has answered a challenge on such grounds by noting:

> "[The] argument that *Igneri* would now be decided differently because a majority of the states now permit the recovery which the court denied in *Igneri* is without merit. . . . The *Igneri* court itself referred to common law which is uniform or nearly so. . . . Recognition of a wife's claim by some 37 states, however, does not mean that the common law is uniform or nearly so."

Additionally, the court recognized:

> "Much of the change in the law has come about through statutory modification of the law, rather than change in the common law." *Id.*

Therefore, the attempt by the court below to distinguish the facts in *Igneri* from the present case on the basis that more states now recognize actions for loss of consortium than did at the time *Igneri* was decided, is much too superficial. Without an indication of the reason for the change in the law, such a purported differentiation of *Igneri* is

simply incorrect, since a statutory modification indicates no necessary change in the common law.

After recognizing that the decision of this Court in *Gaudet* has no applicability to this case, or to any cases involving maritime injury rather than death, it is clear that the few cases declining to follow the *Igneri* rule were simply incorrectly decided.

In *Pesce* v. *Summa Corp.*, 54 Cal. App. 3d 86, 126 Cal. Rptr. 451 (1975), a California intermediate court permitted a wife's action for loss of consortium due to injuries received by her longshoreman husband. However, the authorities cited in *Pesce* were wholly misconstrued by that court, as it relied upon two death actions, namely *Gaudet* and *Skidmore* v. *Grueninger*, 506 F.2d 716 (5th Cir. 1975).

In *Giglio* v. *Farrell Lines, Inc.*, 424 F. Supp. 927 (S.D.N.Y. 1977), the District Court denied the defendant's motion to dismiss a cause of action for loss of consortium in a maritime personal injury case. Judge Lasker concluded that "compensation for [loss of consortium] may well be an idea whose time has come." *Id.* at 930. Acknowledging that his conclusion ignored *Igneri's* teachings, Judge Lasker certified the question for appeal to the Second Circuit, but on February 17, 1977, in an unreported opinion, the Second Circuit denied defendant's petition for leave to appeal, and Giglio's action has since been dismissed on the merits.

Finally, in *Lemon* v. *Bank Lines, Ltd.*, 411 F. Supp. 677 (S.D. Ga. 1976), Judge Lawrence aligned himself with the *Pesce* court, and denied the defendant's motion to dismiss a cause of action for loss of consortium in a maritime personal injury case. However, the rationale used by the district court in *Lemon* fails for the same reason as it does in *Pesce*. Indeed, such a failure was recognized by the court itself when it reversed its decision and dismissed the complaint on the authority of *Christofferson*, in an

unreported opinion on March 14, 1977, which decision was affirmed without opinion at 562 F.2d 1259 (5th Cir. 1977).

The present state of the law on the issue of loss of consortium damages in a maritime personal injury case was cogently stated by the court in *Wetters* v. *Moore-McCormack Lines*, 1977 A.M.C. 1529, 1536-37 (D. Md.). There, such a claim by the wife of an injured longshoreman was rejected, and the existing decisions on this point were analyzed:

> "With these conflicting precedents as background, the court must decide whether it will follow the law as established in *Igneri* and followed in *Sanseverino* or whether it will follow the holdings of *Pesce* and *Lemon*. This court holds that the reasoning of *Igneri* is still valid and that, therefore, the wife of an injured longshoreman may not recover damages for loss of consortium.
>
> In the first place, the reasoning of the decision of an intermediate California state court in *Pesce* and the lower federal court in *Lemon* is not so persuasive as to compel this court to abandon the law as established by *Igneri*. It seems to this court that *Pesce* and *Lemon* read too much into the Supreme Court's holding in *Gaudet*. As the court noted in *Christofferson*, the Supreme Court in *Gaudet* was concerned with recovery in wrongful death actions and not with recovery where the longshoreman was injured. *Lemon* and *Pesce* reason that there should be no distinction between the recovery allowed when a longshoreman is injured and that allowed when he is killed. However, there is a reason for that distinction, one that was noted by the court in *Igneri*."

As will be discussed in detail in Point II, this distinction refers to the statutory prohibition against recovery for

loss of consortium by the spouse of an injured seaman under the Jones Act, and the resulting inequality to permit such recovery by the spouse of an injured longshoreman.

D. The New York State Court of Appeals Has Thwarted the Uniformity Doctrine Applied to Maritime Personal Injury Actions, Mandating That New York State Courts Permit Loss of Consortium Damages.

Exclusive admiralty jurisdiction is granted to the federal district courts pursuant to 28 U.S.C. § 1333; however, that section also saves "to suitors in all cases all other remedies to which they are otherwise entitled." It is settled law that although this statutory language permits an injured maritime worker to choose between bringing his suit in state or federal court, federal maritime law will govern all such actions, wherever brought. *Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239, 245-46 (1942); *Alvez* v. *American Export Lines*, 46 N.Y.2d 634, 638, 415 N.Y.S.2d 979 (1979).

The only two federal appellate courts to address the loss of consortium issue for an injured maritime worker, *Igneri* and *Christofferson*, *supra*, have denied recovery. The court below, acknowledging a disregard for such precedential authority (46 N.Y.2d at 641-42), tentatively set sail in what it considered to be uncharted waters and permitted recovery. Despite such trepidation in unfamilar territory, it effectively scuttled the doctrine of uniformity in the application of the federal maritime law. In its decision below, the New York State Court of Appeals held:

> "In assessing the impact of these cases upon resolution of the issue before us, we proceed cautiously cognizant that it is the general maritime law that governs the rights and liabilities of the parties. . . . Were this a case in which State law were applicable notwithstanding the existence of a Federal question . . . we would

> be free to render a decision on such Federal question differing from pertinent Federal court decisions save a controlling determination of the Supreme Court. . . . To be distinguished, however, are those unique areas, such as admiralty and maritime matters, which either by Constitution or Congressional legislation have been deemed to require a uniform body of national law. . . . In such areas not only does there exist a Federal question, but more importantly, an answer obtainable solely by recourse to Federal law. . . . Thus, notwithstanding the absence of a controlling Supreme Court decision, were there a uniform Federal rule, albeit one established by lower Federal courts, we would be bound in a case such as the one at hand to apply it." 46 N.Y.2d at 638-39 (citations omitted).

The court's opinion presupposes the lack of a uniform federal rule. In fact, there is a uniform federal rule established sixteen years ago in *Igneri*, referred to in *Gaudet*, and reaffirmed in *Christofferson*. Hence, by its own admission, the New York State Court of Appeals should have ruled that it was, in fact, "bound in a case such as the one at hand to apply it."

In effect, the decision below merely paid lip-service to the unquestioned governing nature of federal maritime law. The correct analysis of this point was expressed by Judge Jones in his dissenting opinion:

> "Were the Federal slate clean and were we therefore free to resolve the issue, it might well be that this argument, buttressed by the expanding recognition of loss of consortium at the common law, should be accepted. Again, however, it is our discipline to follow the controlling decisions of the Federal courts. In *Christofferson* v. *Halliburton Co.* (534 F.2d 1147) the

Circuit Court of Appeals for the Fifth Circuit not only adhered to the holding in *Igneri* but expressly concluded that *Igneri* was not overruled by *Gaudet*. In sum, whatever may be the differences of opinion among the Federal District Courts or the views expressed by other State courts, the only two Circuit Courts of Appeals which have addressed the issue have denied recovery for loss of consortium—one in our own circuit and the other, in the Fifth Circuit, which considered and rejected arguments that *Gaudet* had changed the law.

Not only, in my analysis, is the present state of the applicable Federal law clear, but even if it be recognized that Federal maritime law, as is true of most fields of the law, is and should be subject to the dynamics of appropriate growth and refinement, in my opinion the responsibility for such development properly rests with the Federal courts. Whatever may be our privilege, indeed our obligation, as a common-law court to share responsibility for the evolution and responsiveness of the common law, it is not fitting that we should venture decisional contributions to the developmental processes of maritime law which is characterized by peculiarities, even idiosyncracies. We are neither qualified by judicial experience nor, *inasmuch as any decision we hand down will have no precedential significance in the Federal courts,* can we be held jurisprudentially responsible for the determination which we decide to make." *Id.* at 644 (Jones, J. dissenting) (emphasis added).

Judge Jones recognized the conflict that the majority opinion would create between the "federal maritime law" as applied in New York State courts and in various federal courts. Indeed, if this Court does not review this matter,

the decision of the New York State Court of Appeals will never be reviewed. All lower New York State courts, of course, will be compelled to follow the rule established below by the New York State Court of Appeals. However, federal courts, in New York and elsewhere, would be free to follow the precedential authority of *Igneri* and *Christofferson*. The chaotic result in fragmenting the federal maritime law will lead to widespread forum shopping.

POINT II

The Decision of the New York State Court of Appeals Creates an Unfair, Unnecessary, and Anomalous Distinction Between the Rights of Injured Longshoremen and the Rights of Injured Seamen.

A. To Achieve Uniformity, Parity, and Fairness, Treatment Similar to Seamen Has Historically Been Afforded Longshoremen.

This Court, in *Seas Shipping* v. *Sieracki,* 328 U.S. 85 (1946) created for longshoremen a cause of action for unseaworthiness under the general maritime law. It was reasoned that the two classes of workers—seamen and longshoremen—engaged in a common pursuit for the shipowner, should be afforded the same protection under the law.

> "Running through all of these cases, therefore, to sustain the stevedore's recovery is a common core of policy which has been controlling, although the specific issue has varied from a question of admiralty jurisdiction to one of coverage under statutory liability within the admiralty field. It is that for injuries incurred while working on board the ship in navigable waters the stevedore is entitled to the seaman's traditional and statutory protections, regardless of the

> fact that he is employed immediately by another than the owner. For these purposes he is, in short, a seaman because he is doing a seaman's work and incurring a seaman's hazards. Moreover, to make the policy effective, his employer is brought within the liability which is peculiar to the employment relation to the extent that and because he also undertakes the service of the ship". *Id.* at 99.

Hence, the Court elevated the status of longshoremen to that of their seamen prototypes.

In *Igneri* v. *Cie. de Transports Oceaniques,* 323 F.2d 257 (2d Cir. 1963), *cert. denied,* 376 U.S. 949 (1964), the Second Circuit drew analogical support for its holding from the provisions of the Death on the High Seas Act (DOHSA), 46 U.S.C. §§761 *et seq.,* and the Jones Act, 46 U.S.C. §688. After analyzing both Acts, Judge Friendly concluded that neither one permitted a non-pecuniary consortium recovery. Therefore, to avoid "capricious differences in treatment between similarly situated persons," the Court held that no such recovery was permitted the spouse of an injured longshoreman. As demonstrated herein, the decision below by the New York State Court of Appeals has destroyed this parity, creating a serious anomaly in the Federal Maritime Law and its guiding principle of uniformity.

B. Recovery For Loss of Consortium Is Not Permitted Under the Death on the High Seas Act (DOHSA).

Neither *Moragne,* which created a wrongful death cause of action under the general maritime law, nor *Gaudet,* which expanded the death remedy to include a claim for loss of consortium by a widow, involved DOHSA, since both involved accidents occurring within territorial waters. However, such an issue was faced by this Court in *Mobil*

Oil Corp. v. *Higginbotham,* 436 U.S. 618 (1978). There, this Court only had to look to the statutory language of DOHSA.

> "The recovery in such suit shall be a fair and just compensation for the *pecuniary loss* sustained by the persons for whose benefit the suit is brought . . ." 46 U.S.C. §762 (emphasis added).

Since its provisions clearly limit the recovery permitted under DOHSA to "pecuniary loss," *Higginbotham* denied loss of consortium damages to the decedent's survivors. Indeed, no real determination had to be made:

> "Congress has struck the balance for us. It has limited survivors to recovery of their pecuniary losses." 436 U.S. at 623.

Therefore, due to the clear applicability of DOHSA to deaths occurring beyond the territorial waters, recovery in such actions would be limited to "pecuniary loss"; however, if the death occurs within the territorial waters, damages for non-pecuniary loss, such as loss of consortium, may be recovered. *See id.* at 626 (Marshall, J., dissenting). Although a possibly anomalous result, after the decision in *Gaudet,* it was compelled by the statutory provisions of DOHSA.

C. Recovery For Loss of Consortium Is Not Permitted Under the Jones Act.

Although not as explicit as DOHSA, the statutory language of the Jones Act similarly precludes a claim for loss of consortium damages in a seaman's personal injury action. In pertinent part, the Jones Act provides:

> "*Any seaman* who shall suffer personal injury in the course of his employment may, at his election,

maintain an action for damages at law . . ." 46 U.S.C. §688 (emphasis added).

As the Jones Act clearly states, the right to bring the action is limited to "any seaman." By definition, an action for loss of consortium must be brought by the spouse of a seaman, as such a claim is derivative from the main cause of action. Therefore, the Jones Act, by its statutory provision, does not apply to such an action for loss of consortium.

> "When Congress, in 1915, gave a seaman the right to recover for personal injury caused by his employer's negligence under the Jones Act, it did not authorize recovery by the seaman's wife for loss of consortium but restricted the cause of action to 'any seaman.'" *Christofferson, supra* at 1149.

See also Ivy v. *Security Barge Lines, Inc.*, 585 F.2d 732 (5th Cir. 1978); *Igneri, supra; Westcott* v. *McAllister Bros.*, 463 F. Supp. 1039 (S.D.N.Y. 1978); *Wetters* v. *Moore-McCormack Lines*, [1977] A.M.C. 1529 (D. Md.). Indeed, as noted by *Ivy, supra* at 738, this Court in *Higginbotham* has also implicitly affirmed such an interpretation of the Jones Act in a wrongful death case:

> "By deciding that pecuniary damages could not be recovered by any of the plaintiffs, including the representative of Shinn [a Jones Act seaman], the Supreme Court decided sub silentio that a Jones Act seaman's beneficiaries cannot recover nonpecuniary damages for a death occurring on the high seas. Were nonpecuniary damages available under the Jones Act, although not under DOHSA, the Supreme Court would have affirmed as to Shinn while reversing as to the other plaintiffs."

Therefore, just as DOHSA precludes recovery for loss of consortium damages, so also does the Jones Act in both seamen's personal injury and wrongful death actions.

D. In the Interest of Uniformity, Parity, and Fairness, No Distinction Should Be Made Between the Rights of Injured Longshoremen and Injured Seamen.

In his landmark *Igneri* decision, Judge Friendly relied on the preclusion in the Jones Act against the maintenance of an action for loss of consortium by the spouse of an injured longshoreman:

> "The failure of the Jones Act to confer [the right to recover for loss of consortium] on the spouse of a seaman cannot be dismissed as an inadvertence". 323 F.2d at 266.

Therefore, to avoid both an anomalous situation, as well as "capricious differences in treatment between similarly situated persons," the court denied loss of consortium damages to the wife of an injured longshoreman.

> "Perceiving the anomaly in the rule which forbade a seaman, but not a harbor-worker, to recover for negligence against the ship, Congress largely ended the discrimination against seamen by passing the Jones Act; we should not create a new anomaly by giving the harbor-worker's wife a claim denied to the seaman's. . . . We can think of no reason why Congress, having ruled out a maritime claim against the ship for loss of consortium by the spouse of a negligently injured seaman, would wish the Courts to construct one for the spouse of a negligently injured stevedore . . . .
>
> We can see no sensible basis for saying that although Congress ruled out a claim by the wife of a seaman against a palpably negligent shipowner, the wife of a

longshoreman can recover against a shipowner who has been wholly without fault." *Id.* at 267-68.

Instead of avoiding such an anomalous situation, however, the New York State Court of Appeals, in its decision below, created one, terming such anomalies "a currently accepted fact of life". 46 N.Y. 2d at 640-41. In support of this anomaly, the court cited the difference in recovery permitted by this court in *Gaudet* and *Higginbotham*. However, the New York Court failed to realize that such a comparison was not applicable to the case before it. When the applicability of DOHSA in such a situation first faced this Court in *Higginbotham*, the *Gaudet* decision that loss of consortium damages could be recovered in a maritime wrongful death action had already been made. The decision in *Higginbotham* was compelled by the statutory language of DOHSA; the only manner in which to avoid any distinctions therein would have been to overturn the prior *Gaudet* decision.

The situation presented to the New York Court of Appeals below, however, was exactly the opposite. There, instead of being faced with the applicability of a statute which would compel that a distinction be made, the court was given the opportunity to avoid an anomalous situation by following, in a longshoreman's personal injury action, the clear requirements of the Jones Act in such a seaman's action. Instead, the court chose to create an unfair, and wholly unnecessary anomaly.

It is true that denying recovery for loss of consortium here differentiates between the damages available for an injury, as opposed to the death of a longshoreman; however, this is exactly the point made in *Gaudet* when it specified that these damages could not accrue until death. Additionally, it avoids the only other possible choice,

namely the totally inequitable result of permitting the wife of an injured longshoreman to recover for loss of consortium, even though the wife of an injured seaman clearly cannot do so under the Jones Act. This issue was most recently thoroughly examined in *Wetters* v. *Moore-McCormack Lines* (1977) A.M.C. 1529, 1537-38 (D. Md.).

> "In *Igneri*, the court was concerned that there be no difference in the recovery allowed a seaman and one allowed a longshoreman. When a seaman is injured through negligence, his spouse has no claim for loss of consortium . . . .
>
> Thus, when Congress, in 1915, gave a seaman the right to recover for personal injury caused by his employer's negligence under the Jones Act, it did not authorize recovery by the seaman's wife for loss of consortium but restricted the cause of action to 'any seaman.' See *Christofferson, supra.* The court in *Igneri* reasoned that Congress did not want the wife of an injured longshoreman to recover for loss of consortium when the wife of an injured seaman could not so recover. This reasoning is still valid today, and the court is not convinced . . . that there should be any distinction between a longshoreman and a seaman in terms of damages for loss of consortium.
>
> In actions for wrongful death, damages for loss of consortium can be awarded under the general maritime law to the spouse of any maritime death victim, whether longshoreman or seaman. Therefore, in permitting damages for loss of consortium in wrongful death cases, the Supreme Court in *Gaudet* did not create any distinction between a longshoreman and a seaman . . . .
>
> As Congress in the Jones Act did not extend the recovery to the spouse of an injured seaman, this court will continue to limit the recovery of the spouse of an

injured longshoreman and will not permit that spouse to recover damages for loss of consortium. It appears to the court to be more equitable to follow *Igneri* than to permit the spouse of a longshoreman to recover for loss of consortium when the longshoreman is injured or killed when the spouse of a seaman can recover only when the seaman is killed."

Policy and logic, therefore, clearly evince that the decision below by the New York Court of Appeals, permitting recovery for loss of consortium by the wife of an injured longshoreman, even though such recovery is barred by the Jones Act to the wife of an injured seaman, created an unnecessary and unfair distinction, and should be reversed by this Court.

CONCLUSION

It is respectfully submitted that the Petition for a Writ of Certiorari be granted (a) to assure that maritime workers, seamen and longshoremen alike, be treated evenhandedly before the law, and (b) to have this Court, not the state courts, settle the law on the subject.

Respectfully submitted,

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Of Counsel

Appendices

APPENDIX A

Opinion of New York State Supreme Court, Special Term, New York County

(August 17, 1976)

GILBERTO ALVEZ,

—against—

AMERICAN EXPORT LINES, INC.

The following papers numbered 1 to 9 read on this motion, No. 188 on Calendar of June 2, 1976.

	PAPERS NUMBERED
Notice of Motion—Order to Show Cause—and Affidavits Annexed	1–7
Answering Affidavit	8
Replying Affidavit	9

Upon the foregoing papers this Motion by the plaintiff for permission to amend his complaint and bill of particulars to assert a cause of action for loss of consortium is denied.

It is conceded that this action is governed by maritime law. Under maritime law, claims for loss of consortium are not available. Igneri v. Cie de Transports Oceaniques, 323 F. 2d 257.

Dated 8-13-76

(Illegible)
J.S.C.

County Clerk's No. 10898, 1975
Spec I Liber A66 Line 2, 1976

APPENDIX B

Opinion of New York State Supreme Court Appellate Division, First Department

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on November 29, 1977

Present

HON. THEODORE R. KUPFERMAN,
Justice Presiding,
" SAMUEL J. SILVERMAN,
" ARTHUR MARKEWICH,
" PAUL J. YESAWICH, JR.,
Justices.

GILBERTO ALVEZ,
Plaintiff-Appellant,
—against—

AMERICAN EXPORT LINES, INC.,
Defendant, Third-Party Plaintiff-Respondent,
—against—

JOSEPH VINAL SHIP MAINTENANCE, INC.,
Third-Party Defendant-Respondent.

An appeal having been taken to this Court by the plaintiff-appellant from the order of the Supreme Court,

Appendix B

New York County (Nadel, J.), entered on August 17, 1976, denying plaintiff's motion to amend his complaint and bill of particulars, and said appeal having been argued by Mr. Paul C. Matthews of counsel for the appellant, and by Mr. Stephen K. Carr of counsel for respondent American Export Lines, Inc., and by Mr. William M. Kimball of counsel for the respondent Joseph Vinal Ship Maintenance, Inc.; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It is unanimously ordered that the order so appealed from be and the same is hereby reversed, on the law, without costs and without disbursements, and the motion granted.

ENTER:

Clerk.

APPENDIX B (continued)

Order of New York State Supreme Court, Appellate Division, First Department

KUPFERMAN, *J.P.*,
SILVERMAN, MARKEWICH, YESAWICH, *JJ.*

1131N

GILBERTO ALVEZ,

Plaintiff-Appellant,

P.C.Matthews

—against—

AMERICAN EXPORT LINES, INC.,

Defendant, Third-Party Plaintiff-Respondent,

S.K.Carr

—against—

JOSEPH VINAL SHIP MAINTENANCE, INC.,

Third-Party Defendant-Respondent.

W.M.Kimball

Order, Supreme Court, New York County (Nadel, J.), entered August 17, 1976, unanimously reversed, on the law, and the motion to amend the complaint granted, without costs and without disbursements. Plaintiff-appellant in this maritime personal injury action has sought to add his wife's cause for loss of consortium. Defendant-respondent relied on *Igneri* v. *Cie. Transport Oceaniques,* 323

Appendix B

F. 2d 257 (1963) to the effect that such causes are not available under maritime law, and Special Term agreed. We do not consider that the applicable law in its present state is so clearly against such a cause being advanced at the pleading stage of the case. Such causes are currently held acceptable, one such case being *Sea-Land Services* v. *Gaudet,* 414 U.S. 573, a wrongful death case. We know of no reason why this should not be acceptable in a personal injury case. See also *Pesce* v. *Summa Corp.,* 54 Cal. App. 3rd 86.

Order filed.

APPENDIX C

Order of New York State Supreme Court, Appellate Division, First Department, Granting Motion to Appeal to New York State Court of Appeals

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on February 16, 1978.

Present

HON. THEODORE R. KUPFERMAN,
Justice Presiding,
" SAMUEL J. SILVERMAN,
" ARTHUR MARKEWICH,
" PAUL J. YESAWICH, JR.,
Justices.

M-88

GILBERTO ALVEZ,
Plaintiff-Appellant,

—against—

AMERICAN EXPORT LINES, INC.,
Defendant, Third-Party Plaintiff-Respondent,

—against—

JOSEPH VINAL SHIP MAINTENANCE, INC.,
Third-Party Defendant-Respondent.

The above-named defendant, third-party plaintiff-respondent having moved for leave to appeal to the Court of

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Appendix C

Appeals from the order of this Court entered on November 29, 1977,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavits of Stephen K. Carr and William M. Kimball and the communication of Stephen K. Carr, dated January 16, 1978 in support of said motion, and after hearing Mr. Stephen K. Carr and Mr. William M. Kimball for the motion, and no one appearing in opposition thereto,

It is ordered that said motion be and the same hereby is granted and this Court, pursuant to CPLR 5713, certifies that the following question of law, decisive of the correctness of its determination, has arisen, which in its opinion ought to be reviewed by the Court of Appeals:

"Was the order of this Court, which reversed the order of the Supreme Court an abuse of discretion as a matter of law?"

ENTER:

JOSEPH J. LUCCHI
Clerk.

APPENDIX D

Majority and Dissenting Opinions of New York State Court of Appeals

GILBERTO ALVEZ, Respondent, v AMERICAN EXPORT LINES, INC., Defendant and Third-Party Plaintiff-Appellant. JOSEPH VINAL SHIP MAINTENANCE, INC., Third-Party Defendant-Respondent.

Argued February 15, 1979; decided April 3, 1979

Stephen K. Carr & Gary D. Stumpp, New York City, for Third-Party Appellant.

William M. Kimball & Peter M. Prior, New York City, for Third-Party Respondent.

Paul C. Matthews, New York City, for Respondent.

OPINION OF THE COURT

JASEN, J.

To be resolved on this appeal is the question whether the wife of an injured harbor worker may seek recovery for loss of consortium occasioned by her husband's injury.

Respondent, while working as a ship's lasher aboard appellant's[1] vessel, the "Export Builder", was injured within the territorial waters of this State when struck by the handle of an allegedly defective tension jack, resulting in the enucleation of his right eye. After commencing this

[1] Appellant American Export Lines, Inc., impleaded respondent's employer, Joseph Vinal Ship Maintenance, Inc., as a third-party defendant.

action, respondent moved to amend his complaint to add his spouse, as a party plaintiff in an action for loss of consortium. Special Term denied respondent's motion, reasoning that the general maritime law does not afford a remedy for loss of consortium. The Appellate Division unanimously reversed, granted respondent's motion and certified the following question: "Was the order of this Court, which reversed the order of Supreme Court an abuse of discretion as a matter of law?" The order of the Appellate Division should be affirmed and the certified question answered in the negative.

In denying respondent's motion, Special Term relied entirely upon *Igneri v Cie. de Transports Oceaniques* (323 F2d 257, cert den 376 US 949), in which the Second Circuit held that the spouse of a longshoreman injured while working aboard a vessel in Brooklyn harbor had no cause of action for loss of consortium whether caused by negligence of the owner or unseaworthiness of the vessel. (323 F2d, at pp 265-268, *supra.*) In reaching this conclusion, the court observed that maritime law will often draw upon the law of the land where clear precedent does not exist in the former. With respect to recovery for loss of consortium, the court posited that if an admiralty court found that "the common law recognized a wife's claim for loss of consortium, uniformly or nearly so," it would query why it should not similarly recognize such a claim. (*Id.*, at p 260.)

Upon examining the state of the common law, the court found that although the great majority of States recognized the existence of a cause of action by a husband for loss of consortium, only 12 jurisdictions permitted a similar recovery by a wife. In light of the absence of a clear rule either permitting or prohibiting such recovery, the court turned to a consideration of which rule best comported with then

existing principles of maritime law. Relying primarly upon the unavailability of such relief to the wife of an injured seaman under the Jones Act (US Code, tit 46, § 688), the court concluded that it would be anomalous to permit recovery for loss of consortium by the wife of a longshoreman, whether on a theory of negligence or unseaworthiness. (*Id.*, at pp 265-268.)

In the years since the Second Circuit's decision in *Igneri*, maritime law has not remained static but, like the common law, has undergone significant change. In 1963, the year of the *Igneri* decision, the Supreme Court's decision in *The Harrisburg* (119 US 199, 213), still ruled the day, holding that maritime law did not afford a cause of action for wrongful death. However, in 1970, the Supreme Court overruled *The Harrisburg* and recognized the existence of an action for wrongful death under the general maritime law. (*Moragne v States Mar. Lines*, 398 US 375, 409.) In so holding, the court left for future consideration the precise scope of the remedy recognized. (*Id.*, at pp 405-408.)

Further delineation of the breadth of the wrongful death cause of action afforded by general maritime law soon followed in *Sea-Land Servs. v Gaudet* (414 US 573), wherein the court held that a decedent's dependents may recover for, among other elements of damage, loss of society, which the court defined as including a decedent's "love, affection, care, attention, companionship, comfort, and protection." (*Id.*, at p 585 [footnote omitted].) The court was careful, however, to exclude from the concept of society recovery for mental anguish or grief.[2] (*Id.*, at n 17.)

In assessing the impact of these cases upon resolution of the issue before us, we proceed cautiously cognizant that it

[2] With this definition in mind, the terms consortium and society will be used interchangeably.

is the general maritime law that governs the rights and liabilities of the parties. (*Romero v International Term. Operating Co.*, 358 US 354, 373; *Garrett v Moore-McCormack Co.*, 317 US 239, 245; *Celeste v Prudential-Grace Lines*, 35 NY2d 60, 62-63; *Matter of Rederi* [*Dow Chem. Co.*], 25 NY2d 576, 581, cert den 398 US 939; ALI Study of the Division of Jurisdiction Between State and Federal Courts, § 1316[b], at p 239 [Off Draft, 1969].) Were this a case in which State law were applicable notwithstanding the existence of a Federal question (see, e.g., *People v Payton*, 45 NY2d 300, 312), we would be free to render a decision on such Federal question differing from pertinent Federal court decisions save a controlling determination of the Supreme Court. (*People ex rel. Ray v Martin*, 294 NY 61, 73, affd 326 US 496.) To be distinguished, however, are those unique areas, such as admiralty and maritime matters, which either by Constitution or Congressional legislation have been deemed to require a uniform body of national law. (See, generally, Hart, Relations Between State and Federal Law, 54 Col L Rev 489.) In such areas not only does there exist a Federal question, but more importantly, an answer obtainable solely by recourse to Federal law. (Cf. *Teamsters Local v Lucas Flour Co.*, 369 US 95, 102.) Thus, notwithstanding the absence of a controlling Supreme Court decision, were there a uniform Federal rule, albeit one established by lower Federal courts, we would be bound in a case such as the one at hand to apply it.

It is, therefore, with great deference that we proceed to an analysis of the question before us. Critical to its resolution is the effect which *Moragne* and *Gaudet* have had upon general maritime law and in particular upon the continued validity of *Igneri*. Judicial interpretation of these developments has not been uniform, leaving uncertain whether

there presently exists a cause of action for loss of consortium in a personal injury action under the general maritime law. (Compare *Giglio v Farrell Lines,* 424 F Supp 927, mot for lv to app den No. 77-8014 [2d Cir, Feb. 17, 1977],[3] and *Lemon v Bank Lines,* 411 F Supp 677, dismd upon reconsideration in light of *Christofferson v Halliburton Co.,* 534 F2d 1147, affd without opn 562 F2d 1259, and *Pesce v Summa Corp.,* 54 Cal App 3d 86 [upholding cause of action for loss of consortium], with *Christofferson v Halliburton Co.,* 534 F2d 1147, *supra,* and *Wetters v Moore-McCormack Lines,* 1977 AMC 1529, and *Davidson v Reederei,* 295 So 2d 700 [Fla] [rejecting cause of action for loss of consortium].)

In our opinion, examination of the *ratio decedendi* of the *Igneri* decision reveals an erosion of its theoretical underpinnings so severe as to precipitate its collapse under its own weight. To begin with, unlike the state of the law of the land as to recovery for loss of consortium then prevailing, the great majority of States, including New York, now recognize such a cause of action by either husband or wife in a personal injury action.[4] In dispelling any argument

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[3] *Giglio* was subsequently dismissed in its entirety. (No. 75 Civ 6359, SDNY, Jan. 5, 1979, app pending No. 79-7078 [2d Cir.])

[4] The following States recognize a wife's cause of action for loss of consortium in a personal injury action either by statute or decisional law: (*Swartz* v *United States Steel Corp.,* 293 Ala 439; *Schreiner* v *Fruit & Equit. Life Assur. Soc.,* 519 P2d 462 [Ala]; *City of Glendale* v *Bradshaw,* 108 Ariz 582; *Missouri Pacific Transp. Co.* v *Miller,* 227 Ark 351; *Rodriguez* v *Bethlehem Steel Corp.,* 12 Cal 3d 382; Col Rev Stat, § 14-2-209; *Yoner* v *Adams,* 53 Del 229; *Gates* v *Foley,* 247 So 2d 40 [Fla]; *Brown* v *Georgia-Tennessee Coaches,* 88 Ga App 519; *Nichols* v *Sonneman,* 91 Idaho 199; *Dini* v *Naiditch,* 20 Ill 2d 406; *Troue* v *Marker,* 253 Ind 284; *Acuff* v *Schmit,* 248 Iowa 272; Kan Stat Ann, § 23-205; *Kotsiris* v *Ling,* 451 SW2d 411 [Ky]; Me Rev Stat, tit 19, § 167-A; *Deems* v *Western Md. Ry. Co.,* 247 Md 95; *Diaz* v *Lilly & Co.,* 364 Mass 153; *Montgomery* v *Stephan,* 359 Mich 33; *Thill* v *Modern Erecting Co.,* 284 Minn 508; Miss Code Ann, § 93-3-1; *Novak* v *Kansas City Tr.,* 365 SW2d 539 [Mo]; *Duffy* v *Lipsman-Fulkerson & Co.,* 200 F Supp 71; *Cooney* v *Moomaw,* 109 F Supp 448; NH Rev Stat Ann, § 507:8-a; *General Elec. Co.* v *Bush,* 88 Nev 360; *Ekalo* v *Constructive Serv. Corp.,* 46 NJ 82; *Millington* v *Southeastern Elevator Co.,* 22 NY2d 498; *Clouston* v *Remlinger Oldsmobile Cadillac,* 22 Ohio St 2d 65; Okla Stat Ann, tit 32, § 15; Ore Rev Stat, § 108.010; *Hopkins* v *Blanco,* 457 Pa 90; *Hoekstra* v *Helgeland,* 78 SD 82; Tenn Code Ann, § 25-109; W Va Code, § 48-3-19a; *Moran* v *Quality Aluminum Casting Co.,* 34 Wis 2d 542.)

that a wife does not have as great a right to her husband's consortium as he to hers, we stated: "'The gist of the matter is that in today's society the wife's position is analogous to that of a partner, neither kitchen slattern nor upstairs maid. Her duties and responsibilities in respect of the family unit complement those of the husband, extending only to another sphere. In the good times she lights the hearth with her own inimitable glow. But when tragedy strikes it is a part of her unique glory that, forsaking the shelter, the comfort, the warmth of the home, she puts her arm and shoulder to the plow. We are not at the heart of the issue. In such circumstances, when her husband's love is denied her, his strength sapped, and his protection destroyed, in short, when she has been forced by the defendant to exchange a heart for a husk, we are urged to rule that she has suffered no loss compensable at the law. But let some scoundrel dent a dishpan in the family kitchen and the law, in all its majesty, will convene the court, will march with measured tread to the halls of justice, and will there suffer a jury of her peers to assess the damages. Why are we asked, then, in the case before us, to look the other way? Is this what is meant when it is said that justice is blind?'" (*Millington v Southeastern Elevator Co.,* 22 NY2d 498,

503-504, quoting *Montgomery v Stephan,* 359 Mich 33, 48-49.)

In addition to the absence of a rule at common law recognizing "a wife's claim for loss of consortium, uniformly or nearly so," (*Igneri v Cie. de Transports Oceaniques,* 323 F2d, at p 260, *supra*), the Second Circuit hinged its decision upon the anomaly it perceived in permitting a longshoreman's wife to recover for loss of consortium when the wife of an injured seaman would not be afforded a similar right under the Jones Act (US Code, tit 46, § 688). (323 F2d, at pp 266-268.) That such anomalies do exist in the remedies afforded injured maritime workers is, however, a currently accepted fact of life. For example, although the wife of a deceased longshoreman may recover for loss of consortium in a wrongful death action under the general maritime law (*Sea-Land Servs. v Gaudet,* 414 US 573, *supra*), recovery for wrongful death under the Death on the High Seas Act (US Code, tit 46, §§ 761, 762) is limited to pecuniary loss and does not afford a remedy for loss of a wife's consortium. (*Mobil Oil Corp. v Higginbotham,* 436 US 618.)

The Second Circuit's concern, in *Igneri,* with the absence of a clear common-law rule as to recovery for loss of consortium and with the avoidance of anomalous remedies in maritime law is clearly manifested in its observation: "If there were evidence that maritime law generally recognized a claim for negligent injury to such an intangible right, or if the common law clearly authorized a wife's recovery, the gravitational pull of such concepts with respect to the wife of a longshoreman might be stronger than that of the analogy to the statute, denying such recovery to a seaman's wife. But, with neither of these conditions realized, our duty to avoid capricious differences in treatment between

similarly situated persons forbids our fashioning a rule that would place the spouse of a harbor-worker in a different, and better, position that the spouse of a seaman." (323 F2d, at p 267, *supra.*) We believe that the clear recognition by the law of the land of the right of a wife to recover for loss of consortium in a personal injury action, together with the recognition of such right in wrongful death actions under the general maritime law, exert, in the words of the Second Circuit, a "gravitational pull" of sufficient intensity to require recognition of respondent's claim. (See 2 Benedict, Admiralty [7th rev ed], § 12, pp 1-66—1-74; Comment, Loss of Consortium in Admiralty: A Yet Unsettled Question, 1977 BYU L Rev 133.)

In reaching this conclusion, we are cognizant that the Fifth Circuit has interpreted *Gaudet* (*supra*) as limited to authorizing recovery for loss of consortium under the general maritime law to wrongful death actions. (*Christofferson v Halliburton Co.,* 534 F2d 1147, *supra.*) Critical to the court's determination were two factors: first, its belief that recognition of a wife's claim for loss of consortium by 37 States is not indicative of a uniformity in the common law; and, second, its interpretation of *Gaudet* as holding that a cause of action for loss of consortium cannot accrue until the decedent's death. (*Id.,* at pp 1150-1151.)

With all due respect, we cannot agree with the *Christofferson* court's reasoning. Concerning the state of the common law, it is difficult to conclude that a clear rule authorizing a wife's recovery for loss of consortium in a personal injury action does not exist. In *Gaudet,* the Supreme Court surveyed State wrongful death statutes concluding that "[a] clear majority of States" permit recovery for loss of society. (414 US, at p 587, *supra.*) It supported this proposition by the finding that 27 of the 44 State and

territorial wrongful death statutes that measure damages by the loss sustained by beneficiaries permit recovery for loss of society. (*Id.*, at n 21.) In our view, it would be overly artificial to view the present state of the common law as to recovery for loss of consortium in a personal injury action as anything but nearly uniform. Moreover, we would also question the relevancy of the *Christofferson* court's statement: "Much of the change in the law has come about through statutory modification of the law, rather than change in the common law." (534 F2d, at p 1150, *supra.*) In our opinion, it matters little whether a State's recognition of the cause of action at issue is rooted in statute or decisional law.

As to the Supreme Court's reference to the accrual of a cause of action for loss of consortium, the factual setting in *Gaudet* is critical. There, the injured seaman had already recovered for his personal injuries prior to his death. Thereafter, his widow commenced a wrongful death action seeking as an element of damage recovery for loss of society. The trial court dismissed the action on the ground of *res judicata.* In affirming the reversal of this order by the Circuit Court of Appeals (463 F2d 1331), the Supreme Court stated: "Obviously, the decedent's recovery did not include damages for the dependents' loss of services or of society, and funeral expenses. Indeed, these losses—unique to the decedent's dependents—could not accrue until the decedent's death." (414 US, at pp 591-592, *supra.*) It is this language which the Fifth Circuit in *Christofferson* interpreted as implicitly limiting the right to recover for loss of consortium to wrongful death actions on the ground that a cause of action for loss of consortium does not accrue absent death. We would not read this language so broadly as it would appear to have been intended merely

to identify the widow's wrongful death action as an action separate and apart from the decedent's personal injury action, precluding application of *res judicata* principles.

In holding as we do today, we are sensitive to the limited role of the State court in maritime matters, bound as it is to apply Federal maritime law. In applying this body of law, we are equally sensitive to the well-settled principle that "certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules." (*Moragne* v *States Mar. Lines,* 398 US 375, 387, *supra,* quoting *The Sea Gull,* 21 F Cas 909, 910.) Examination of current maritime law reveals, in our opinion, an absence of any established and inflexible rule barring recognition of the claim before us.

Accordingly, the order of the Appellate Division should be affirmed, with costs, and the certified question answered in the negative.

Jones, J. (dissenting). I am obliged to dissent in observance of what I perceive to be proper jurisprudential restraint. All agree that in this maritime action instituted in State court Federal maritime law governs. Our sole responsibility then is to determine the applicable Federal law. If the present state of such law is reasonably clear, we are not free to speculate what it may some day come to be.

In *Igneri v Cie. de Transports Oceaniques* (323 F2d 257, cert den 376 US 949) the Circuit Court of Appeals for the Second Circuit, within the territorial boundaries of which circuit our court sits, decided explicitly in 1963 that loss of consortium was not recognized under Federal maritime law. That determination is recognized as binding on the Federal District Courts within the Second Circuit (*Tornatore v Koninklijke Nederlandsche Stoomboot Maatschappij, N. V.*

"Sinon", USDCEDNY, Docket No. 75 C 69 [Dec. 6, 1976]; cf. *Giglio v Farrell Lines*, 424 F Supp 927, mot for lv to app den 2d Cir., Docket No. 77-8014 [Feb. 17, 1977]).* It is urged, however, that the decision of the Supreme Court of the United States in *Sea-Land Servs. v Gaudet* (414 US 573) in 1974 impliedly if not expressly overruled *Igneri*. Plaintiff constructs an appealing argument to support that conclusion. Were the Federal slate clean and were we therefore free to resolve the issue, it might well be that this argument, buttressed by the expanding recognition of loss of consortium at the common law, should be accepted. Again, however, it is our discipline to follow the controlling decisions of the Federal courts. In *Christofferson v Halliburton Co.* (534 F2d 1147) the Circuit Court of Appeals for the Fifth Circuit not only adhered to the holding in *Igneri* but expressly concluded that *Igneri* was not overruled by *Gaudet*. In sum, whatever may be the differences of opinion among the Federal District Courts or the views expressed by other State courts, the only two Circuit Courts of Appeals which have addressed the issue have denied recovery for loss of consortium—one in our own circuit and the other, in the Fifth Circuit, which considered and rejected arguments that *Gaudet* had changed the law.

Not only, in my analysis, is the present state of the applicable Federal law clear, but even if it be recognized that Federal maritime law, as is true of most fields of the law,

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* In *Giglio*, a panel of the Court of Appeals for the Second Circuit declined an express invitation to overrule *Igneri*. That the court thereby left standing the District Court's view that the time may have come for such overruling is not to be construed as approval or rejection of that view (cf. the denial of petitions for writs of certiorari by the United States Supreme Court). It is noted that the *Giglio* case has subsequently been dismissed in its entirety (USDCSDNY, Docket No. 75 Civ 6359 [Jan. 5, 1979]) and an appeal is now pending from that disposition (2d Cir, Docket No. 79-7078).

is and should be subject to the dynamics of appropriate growth and refinement, in my opinion the responsibility for such development properly rests with the Federal courts. Whatever may be our privilege, indeed our obligation, as a common-law court to share responsibility for the evolution and responsiveness of the common law, it is not fitting that we should venture decisional contributions to the developmental processes of maritime law which is characterized by peculiarities, even idiosyncrasies. We are neither qualified by judicial experience nor, inasmuch as any decision we hand down will have no precedential significance in the Federal courts, can we be held jurisprudentially responsible for the determination which we decide to make.

Accordingly, under constraint of the present state of Federal law, I would reverse the order of the Appellate Division and deny the motion to amend the complaint.

Chief Judge COOKE and Judges GABRIELLI, WACHTLER and FUCHSBERG concur with Judge JASEN; Judge JONES dissents and votes to reverse in a separate opinion.

Order affirmed, etc.

Supreme Court, U. S.
FILED
DEC 13 1979
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1

AMERICAN EXPORT LINES, INC.,

Petitioner,

v.

GILBERTO ALVEZ AND
JOSEPH VINAL SHIP MAINTENANCE, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE
NEW YORK COURT OF APPEALS

PETITION FOR CERTIORARI FILED JULY 2, 1979
CERTIORARI GRANTED OCTOBER 29, 1979

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APPENDIX A

Order of New York State Supreme Court,
Special Term, New York County

(August 17, 1976)

GILBERTO ALVEZ,

—against—

AMERICAN EXPORT LINES, INC.

The following papers numbered 1 to 9 read on this motion, No. 188 on Calendar of June 2, 1976.

	PAPERS NUMBERED
Notice of Motion—Order to Show Cause— and Affidavits Annexed	1–7
Answering Affidavit	8
Replying Affidavit	9

Upon the foregoing papers this Motion by the plaintiff for permission to amend his complaint and bill of particulars to assert a cause of action for loss of consortium is denied.

It is conceded that this action is governed by maritime law. Under maritime law, claims for loss of consortium are not available. Igneri v. Cie de Transports Oceaniques, 323 F. 2d 257.

Dated 8-13-76

(Illegible)
J.S.C.

County Clerk's No. 10898, 1975
Spec I Liber A66 Line 2, 1976

APPENDIX B

Opinion of New York State Supreme Court
Appellate Division, First Department

At a term of Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on November 29, 1977.

Present

HON. THEODORE R. KUPFERMAN,
Justice Presiding,

SAMUEL J. SILVERMAN,
ARTHUR MARKEWICH,
PAUL J. YESAWICH, JR.,
Justices.

GILBERTO ALVEZ,
Plaintiff-Appellant,

—against—

AMERICAN EXPORT LINES, INC.,
Defendant, Third-Party Plaintiff-Respondent,

—against—

JOSEPH VINAL SHIP MAINTENANCE, INC.,
Third-Party Defendant-Respondent.

An appeal having been taken to this Court by the plaintiff-appellant from the order of the Supreme Court,

Appendix B

New York County (Nadel, J.), entered on August 17, 1976, denying plaintiff's motion to amend his complaint and bill of particulars, and said appeal having been argued by Mr. Paul C. Matthews of counsel for the appellant, and by Mr. Stephen K. Carr of counsel for respondent American Export Lines, Inc., and by Mr. William M. Kimball of counsel for the respondent Joseph Vinal Ship Maintenance, Inc.; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It is unanimously ordered that the order so appealed from be and the same is hereby reversed, on the law, without costs and without disbursements, and the motion granted.

ENTER:

Clerk.

APPENDIX B (continued)

Order of New York State Supreme Court, Appellate Division, First Department

KUPFERMAN, *J.P.*,
SILVERMAN, MARKEWICH, YESAWICH, *JJ.*

1131N

GILBERTO ALVEZ,

Plaintiff-Appellant,
P.C. Matthews

—against—

AMERICAN EXPORT LINES, INC.,

Defendant, Third-Party
Plaintiff-Respondent,
S.K. Carr

—against—

JOSEPH VINAL SHIP MAINTENANCE, INC.,

Third-Party
Defendant-Respondent.

W.M. Kimball

Order, Supreme Court, New York County (Nadel, J.), entered August 17, 1976, unanimously reversed, on the law, and the motion to amend the complaint granted, without costs and without disbursements. Plaintiff-Appellant in this maritime personal injury action has sought to add his wife's cause for loss of consortium. Defendant-respondent relied on *Igneri* v. *Cie. Transport Oceaniques,* 323

Appendix B

F. 2d 257 (1963) to the effect that such causes are not available under maritime law, and Special Term agreed. We do not consider that the applicable law in its present state is so clearly against such a cause being advanced at the pleading stage of the case. Such causes are currently held acceptable, one such case being *Sea-Land Services* v. *Gaudet,* 414 U.S. 573, a wrongful death case. We know of no reason why this should not be acceptable in a personal injury case. See also *Pesce* v. *Summa Corp.,* 54 Cal. App. 3rd 86.

Order filed.

APPENDIX C

Order of New York State Supreme Court, Appellate Division, First Department, Granting Motion to Appeal to New York State Court of Appeals

At a term of Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on February 16, 1978.

Present

HON. THEODORE R. KUPFERMAN,
Justice Presiding,

SAMUEL J. SILVERMAN,
ARTHUR MARKEWICH,
PAUL J. YESAWICH, JR.,
Justices.

M-88

GILBERTO ALVEZ,
Plaintiff-Appellant,

—against—

AMERICAN EXPORT LINES, INC.,
Defendant, Third-Party Plaintiff-Respondent,

—against—

JOSEPH VINAL SHIP MAINTENANCE, INC.,
Third-Party Defendant-Respondent.

The above-named defendant, third-party plaintiff-respondent having moved for leave to appeal to the Court of

Appendix C

Appeals from the order of this Court entered on November 29, 1977.

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavits of Stephen K. Carr and William M. Kimball and the communication of Stephen K. Carr, dated January 16, 1978 in support of said motion, and after hearing Mr. Stephen K. Carr and Mr. William M. Kimball for the motion, and no one appearing in opposition thereto,

It is ordered that said motion be and the same hereby is granted and this Court, pursuant to CPLR 5713, certifies that the following question of law, decisive of the correctness of its determination, has arisen, which in its opinion ought to be reviewed by the Court of Appeals:

"Was the order of this Court, which reversed the order of the Supreme Court an abuse of discretion as a matter of law?"

ENTER:

JOSEPH J. LUCCHI
Clerk.

APPENDIX D

Majority and Dissenting Opinions of New York State Court of Appeals

GILBERTO ALVEZ, Respondent, v AMERICAN EXPORT LINES, INC., Defendant and Third-Party Plaintiff-Appellant. JOSEPH VINAL SHIP MAINTENANCE, INC., Third-Party Defendant-Respondent.

Argued February 15, 1979; decided April 3, 1979

Stephen K. Carr & Gary D. Stumpp, New York City, for Third-Party Appellant.

William M. Kimball & Peter M. Pryor, New York City, for Third-Party Respondent.

Paul C. Matthews, New York City, for Respondent.

OPINION OF THE COURT

JASEN, J.

To be resolved on this appeal is the question whether the wife of an injured harbor worker may seek recovery for loss of consortium occasioned by her husband's injury.

Respondent, while working as a ship's lasher aboard appellant's[1] vessel, the "Export Builder", was injured within the territorial waters of this State when struck by the handle of an allegedly defective tension jack, resulting in the enucleation of his right eye. After commencing this

[1] Appellant American Export Lines, Inc., impleaded respondent's employer, Joseph Vinal Ship Maintenance, Inc., as a third-party defendant.

action, respondent moved to amend his complaint to add his spouse as a party plaintiff in an action for loss of consortium. Special Term denied respondent's motion, reasoning that the general maritime law does not afford a remedy for loss of consortium. The Appellate Division unanimously reversed, granted respondent's motion and certified the following question: "Was the order of this Court, which reversed the order of Supreme Court an abuse of discretion as a matter of law?" The order of the Appellate Division should be affirmed and the certified question answered in the negative.

In denying respondent's motion, Special Term relied entirely upon *Igneri v Cie. de Transports Oceaniques* (323 F2d 257, cert den 376 US 949), in which the Second Circuit held that the spouse of a longshoreman injured while working aboard a vessel in Brooklyn harbor had no cause of action for loss of consortium whether caused by negligence of the owner or unseaworthiness of the vessel. (323 F2d, at pp 265-268, *supra.*) In reaching this conclusion, the court observed that maritime law will often draw upon the law of the land where clear precedent does not exist in the former. With respect to recovery for loss of consortium, the court posited that if an admiralty court found that "the common law recognized a wife's claim for loss of consortium, uniformly or nearly so," it would query why it should not similarly recognize such a claim. (*Id.*, at p 260.)

Upon examining the state of the common law, the court found that although the great majority of States recognized the existence of a cause of action by a husband for loss of consortium, only 12 jurisdictions permitted a similar recovery by a wife. In light of the absence of a clear rule either permitting or prohibiting such recovery, the court turned to a consideration of which rule best comported with then

existing principles of maritime law. Relying primarly upon the unavailability of such relief to the wife of an injured seaman under the Jones Act (US Code, tit 46, § 688), the court concluded that it would be anomalous to permit recovery for loss of consortium by the wife of a longshoreman, whether on a theory of negligence or unseaworthiness. (*Id.*, at pp 265-268.)

In the years since the Second Circuit's decision in *Igneri*, maritime law has not remained static but, like the common law, has undergone significant change. In 1963, the year of the *Igneri* decision, the Supreme Court's decision in *The Harrisburg* (119 US 199, 213), still ruled the day, holding the maritime law did not afford a cause of action for wrongful death. However, in 1970, the Supreme Court overruled *The Harrisburg* and recognized the existence of an action for wrongful death under the general maritime law. (*Moragne v States Mar. Lines*, 398 US 375, 409.) In so holding, the court left for future consideration the precise scope of the remedy recognized. (*Id.*, at pp 405-408.)

Further delineation of the breadth of the wrongful death cause of action afforded by general maritime law soon followed in *Sea-Land Servs. v Gaudet* (414 US 573), wherein the court held that a decedent's dependents may recover for, among other elements of damage, loss of society, which the court defined as including a decedent's "love, affection, care, attention, companionship, comfort, and protection." (*Id.*, at p 585 [footnote omitted].) The court was careful, however, to exclude from the concept of society recovery for mental anguish or grief.[2] (*Id.*, at n 17.)

In assessing the impact of these cases upon resolution of the issue before us, we proceed cautiously cognizant that it

[2] With this definition in mind, the terms consortium and society will be used interchangeably.

is the general maritime law that governs the rights and liabilities of the parties. (*Romero v International Term. Operating Co.*, 358 US 354, 373; *Garrett v Moore-McCormack Co*, 317 US 239, 245; *Celeste v Prudential-Grace Lines*, 35 NY2d 60, 62-63; *Matter of Rederi* [*Dow Chem. Co.*], 25 NY2d 576, 581, cert den 398 US 939; ALI Study of the Division of Jurisdiction Between State and Federal Courts, § 1316[b], at p 239 [Off Draft, 1969].) Were this a case in which State law were applicable notwithstanding the existence of a Federal question (see, e.g., *People v Payton*, 45 NY2d 300, 312), we would be free to render a decision on such Federal question differing from pertinent Federal court decisions save a controlling determination of the Supreme Court. (*People ex rel. Ray v Martin*, 294 NY 61, 73, affd 326 US 496.) To be distinguished, however, are those unique areas, such as admiralty and maritime matters, which either by Constitution or Congressional legislation have been deemed to require a uniform body of national law. (See, generally, Hart, Relations Between State and Federal Law, 54 Col L Rev 489.) In such areas not only does there exist a Federal question, but more importantly, an answer obtainable solely by recourse to Federal law. (Cf. *Teamsters Local v Lucas Flour Co.*, 369 US 95, 102.) Thus, notwithstanding the absence of a controlling Supreme Court decision, were there a uniform Federal rule, albeit one established by lower Federal courts, we would be bound in a case such as the one at hand to apply it.

It is, therefore, with great deference that we proceed to an analysis of the question before us. Critical to its resolution is the effect which *Moragne* and *Gaudet* have had upon general maritime law and in particular upon the continued validity of *Igneri*. Judicial interpretation of these developments has not been uniform, leaving uncertain whether

there presently exists a cause of action for loss of consortium in a personal injury action under the general maritime law. (Compare *Giglio v Farrell Lines,* 424 F Supp 927, mot for lv to app den No. 77-8014 [2d Cir, Feb. 17, 1977],[3] and *Lemon v Bank Lines,* 411 F Supp 677, dismd upon reconsideration in light of *Christofferson v Halliburton Co.,* 534 F2d 1147, affd without opn 562 F2d 1259, and *Pesce v Summa Corp.,* 54 Cal App 3d 86 [upholding cause of action for loss of consortium], with *Christofferson v Halliburton Co.,* 534 F2d 1147, *supra,* and *Wetters v Moore-McCormack Lines,* 1977 AMC 1529, and *Davidson v Reederie,* 295 So 2d 700 [Fla] [rejecting cause of action for loss of consortium].)

In our opinion, examination of the *ratio decedendi* of the *Igneri* decision reveals an erosion of its theoretical underpinnings so severe as to precipitate its collapse under its own weight. To begin with, unlike the state of the law of the land as to recovery for loss of consortium then prevailing, the great majority of States, including New York, now recognize such a cause of action by either husband or wife in a personal injury action.[4] In dispelling any argument

[3] *Giglio* was subsequently dismissed in its entirety. (No. 75 Civ 6359, SDNY, Jan. 5, 1979, app pending No. 79-7078 [2d Cir.]).

[4] The following States recognize a wife's cause of action for loss of consortium in a personal injury action either by statute or decisional law: (*Swartz* v. *United States Steel Corp.,* 293 Ala 439; *Schreiner* v. *Fruit & Equit. Life Assur. Soc.,* 519 P2d 462 [Ala]; *City of Glendale* v. *Bradshaw,* 108 Ariz 582; *Missouri Pacific Transp. Co.* v. *Miller,* 227 Ark 351; *Rodriguez* v. *Bethlehem Steel Corp.,* 12 Cal 3d 382; Col Rev Stat, § 14-2-209; *Yoner* v. *Adams,* 53 Del 229; *Gates* v. *Foley,* 247 So 2d 40 [Fla]; *Brown* v *Georgia-Tennessee Coaches,* 88 Ga App 519; *Nichols* v. *Sonneman,* 91 Idaho 199; *Dini* v. *Naiditch,* 20 Ill 2d 406; *Troue* v. *Marker,* 253 Ind 284; *Acuff* v. *Schmit,* 248 Iowa 272; Kan Stat Ann, § 23-205; *Kotsiris* v. *Ling,* 451 SW2d 411 [Ky]; Me Rev Stat, tit 19, § 167-A; *Deems* v. *Western Md. Ry. Co.,* 247 Md 95; *Diaz* v. *Lilly & Co.,* 364 Mass 153; *Montgomery* v. *Stephan,* 359 Mich 33; *Thill* v. *Modern Erecting Co.,* 284 Minn 508; Miss Code Ann, § 93-3-1; *Novak* v. *Kansas City Tr.,* 365 SW2d 539 [Mo]; *Duffy* v. *Lipsman-Fulkerson & Co.,* 200 F Supp 71; *Cooney* v. *Moomaw,* 109 F Supp 448; NH Rev Stat Ann § 507:8-a; *General Elec. Co.* v. *Bush,* 88 Nev 360; *Ekalo* v. *Constructive Serv. Corp.,* 46 NJ 82; *Millington* v. *Southeastern Elevator Co.,* 22 NY2d 498; *Clouston* v. *Remlinger Oldsmobile Cadillac,* 22 Ohio St 2d 65; Okla Stat Ann, tit 32, § 15; Ore Rev Stat, § 108.010; *Hopkins* v. *Blanco,* 457 Pa 90; *Hoekstra* v. *Helgeland,* 78 SD 82; Tenn Code Ann, § 25-109; W Va Code, § 48-3-19a; *Moran* v. *Quality Aluminum Casting Co.,* 34 Wis 2d 542.)

that a wife does not have as great a right to her husband's consortium as he to hers, we stated: "'The gist of the matter is that in today's society the wife's position is analogous to that of a partner, neither kitchen slattern nor upstairs maid. Her duties and responsibilities in respect of the family unit complement those of the husband, extending only to another sphere. In the good times she lights the hearth with her own inimitable glow. But when tragedy strikes it is a part of her unique glory that, forsaking the shelter, the comfort, the warmth of the home, she puts her arm and shoulder to the plow. We are not at the heart of the issue. In such circumstances, when her husband's love is denied her, his strength sapped, and his protection destroyed, in short, when she has been forced by the defendant to exchange a heart for a husk, we are urged to rule that she has suffered no loss compensable at the law. But let some scoundrel dent a dishpan in the family kitchen and the law, in all its majesty, will convene the court, will march with measured tread to the halls of justice, and will there suffer a jury of her peers to assess the damages. Why are we asked, then, in the case before us, to look the other way? Is this what is meant when it is said that justice is blind?'" (*Millington v Southeastern Elevator Co.,* 22 NY2d 498,

503-504, quoting *Montgomery v Stephan,* 359 Mich 33, 48-49.)

In addition to the absence of a rule at common law recognizing "a wife's claim for loss of consortium, uniformly or nearly so," (*Igneri v Cie. de Transports Oceaniques,* 323 F2d, at p 260, *supra*), the Second Circuit hinged its decision upon the anomaly it perceived in permitting a longshoreman's wife to recover for loss of consortium when the wife of an injured seaman would not be afforded a similar right under the Jones Act (US Code, tit 46, § 688). (323 F2d, at pp 266-268.) That such anomalies do exist in the remedies afforded injured maritime workers is, however, a currently accepted fact of life. For example, although the wife of a deceased longshoreman may recover for loss of consortium in a wrongful death action under the general maritime law (*Sea-Land Servs. v Gaudet,* 414 US 573, *supra*), recovery for wrongful death under the Death on the High Seas Act (US Code, tit 46, §§ 761, 762) is limited to pecuniary loss and does not afford a remedy for loss of a wife's consortium. (*Mobil Oil Corp. v Higginbotham,* 436 US 618.)

The Second Circuit's concern, in *Igneri,* with the absence of a clear common-law rule as to recovery for loss of consortium and with the avoidance of anomalous remedies in maritime law is clearly manifested in its observation: "If there were evidence that maritime law generally recognized a claim for negligent injury to such an intangible right, or if the common law clearly authorized a wife's recovery, the gravitational pull of such concepts with respect to the wife of a longshoreman might be stronger than that of the analogy to the statute, denying such recovery to a seaman's wife. But, with neither of these conditions realized, our duty to avoid capricious differences in treatment between

similarly situated persons forbids our fashioning a rule that would place the spouse of a harbor-worker in a different, and better, position that the spouse of a seaman." (323 F2d at p 267, *supra.*) We believe that the clear recognition by the law of the land of the right of a wife to recover for loss of consortium in a personal injury action, together with the recognition of such right in wrongful death actions under the general maritime law, exert, in the words of the Second Circuit, a "gravitational pull" of sufficient intensity to require recognition of respondent's claim. (See 2 Benedict, Admiralty [7th rev ed], § 12, pp 1-66—1-74; Comment, Loss of Consortium in Admiralty: A Yet Unsettled Question, 1977 BYU L Rev 133.)

In reaching this conclusion, we are cognizant that the Fifth Circuit has interpreted *Gaudet (supra)* as limited to authorizing recovery for loss of consortium under the general maritime law to wrongful death actions. (*Christofferson v Halliburton Co.,* 534 F2d 1147, *supra.*) Critical to the court's determination were two factors: first, its belief that recognition of a wife's claim for loss of consortium by 37 States is not indicative of a uniformity in the common law; and, second, its interpretation of *Gaudet* as holding that a cause of action for loss of consortium cannot accrue until the decedent's death. (*Id.,* at pp 1150-1151.)

With all due respect, we cannot agree with the *Christofferson* court's reasoning. Concerning the state of the common law, it is difficult to conclude that a clear rule authorizing a wife's recovery for loss of consortium in a personal injury action does not exist. In *Gaudet,* the Supreme Court surveyed State wrongful death statutes concluding that "[a] clear majority of States" permit recovery for loss of society. (414 US, at p 587, *supra.*) It supported this proposition by the finding that 27 of the 44 State and

territorial wrongful death statutes that measure damages by the loss sustained by beneficiaries permit recovery for loss of society. (*Id.*, at n 21.) In our view, it would be overly artificial to view the present state of the common law as to recovery for loss of consortium in a personal injury action as anything but nearly uniform. Moreover, we would also question the relevancy of the *Christofferson* court's statement: "Much of the change in the law has come about through statutory modification of the law, rather than change in the common law." (534 F2d, at p 1150, *supra.*) In our opinion, it matters little whether a State's recognition of the cause of action at issue is rooted in statute or decisional law.

As to the Supreme Court's reference to the accrual of a cause of action for loss of consortium, the factual setting in *Gaudet* is critical. There, the injured seaman had already recovered for his personal injuries prior to his death. Thereafter, his widow commenced a wrongful death action seeking as an element of damage recovery for loss of society. The trial court dismissed the action on the ground of *res judicata.* In affirming the reversal of this order by the Circuit Court of Appeals (463 F2d 1331), the Supreme Court stated: "Obviously, the decedent's recovery did not include damages for the dependents' loss of services or of society, and funeral expenses. Indeed, these losses—unique to the decedent's dependents—could not accrue until the decedent's death." (414 US, at pp 591-592, *supra.*) It is this language which the Fifth Circuit in *Christofferson* interpreted as implicitly limiting the right to recover for loss of consortium to wrongful death actions on the ground that a cause of action for loss of consortium does not accrue absent death. We would not read this language so broadly as it would appear to have been intended merely

to identify the widow's wrongful death action as an action separate and apart from the decedent's personal injury action, precluding application of *res judicata* principles.

In holding as we do today, we are sensitive to the limited role of the State court in maritime matters, bound as it is to apply Federal maritime law. In applying this body of law, we are equally sensitive to the well-settled principle that "certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules." (*Moragne v States Mar. Lines,* 398 US 375, 387, *supra,* quoting *The Sea Gull,* 21 F Cas 909, 910.) Examination of current maritime law reveals, in our opinion, an absence of any established and inflexible rule barring recognition of the claim before us.

Accordingly, the order of the Appellate Division should be affirmed, with costs, and the certified question answered in the negative.

Jones, J. (dissenting). I am obliged to dissent in observance of what I perceive to be proper jurisprudential restraint. All agree that in this maritime action instituted in State court Federal maritime law governs. Our sole responsibility then is to determine the applicable Federal law. If the present state of such law is reasonably clear, we are not free to speculate what it may some day come to be.

In *Igneri v Cie. de Transports Oceaniques* (323 F2d 257, cert den 376 US 949) the Circuit Court of Appeals for the Second Circuit, within the territorial boundaries of which circuit our court sits, decided explicitly in 1963 that loss of consortium was not recognized under Federal maritime law. That determination is recognized as binding on the Federal District Courts within the Second Circuit (*Tornatore v Koninklijke Nederlandsche Stoomboot Maatschappij, N. V.*

"Sinon", USDCEDNY, Docket No. 75 C 69 [Dec. 6, 1976]; cf. *Giglio v Farrell Lines*, 424 F Supp 927, mot for lv to app den 2d Cir., Docket No. 77-8014 [Feb. 17, 1977]).* It is urged, however, that the decision of the Supreme Court of the United States in *Sea-Land Servs. v Gaudet* (414 US 573) in 1974 impliedly if not expressly overruled *Igneri*. Plaintiff constructs an appealing argument to support that conclusion. Were the Federal slate clean and were we therefore free to resolve the issue, it might well be that this argument, buttressed by the expanding recognition of loss of consortium at the common law, should be accepted. Again, however, it is our discipline to follow the controlling decisions of the Federal courts. In *Christofferson v Halliburton Co.* (534 F2d 1147) the Circuit Court of Appeals for the Fifth Circuit not only adhered to the holding in *Igneri* but expressly concluded that *Igneri* was not overruled by *Gaudet*. In sum, whatever may be the differences of opinion among the Federal District Courts or the views expressed by other State courts, the only two Circuit Courts of Appeals which have addressed the issue have denied recovery for loss of consortium—one in our own circuit and the other, in the Fifth Circuit, which considered and rejected arguments that *Gaudet* had changed the law.

Not only, in my analysis, is the present state of the applicable Federal law clear, but even if it be recognized that

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* In *Giglio*, a panel of the Court of Appeals for the Second Circuit declined an express invitation to overrule *Igneri*. That the court thereby left standing the District Court's view that the time may have come for such overruling is not to be construed as approval or rejection of that view (cf. the denial of petitions for writs of certiorari by the United States Supreme Court). It is noted that the *Giglio* case has subsequently been dismissed in its entirety (USDCSDNY, Docket No. 75 Civ 6359 [Jan. 5, 1979]) and an appeal is now pending from that disposition (2d Cir, Docket No. 79-7078).

Federal maritime law, as is true of most fields of the law, is and should be subject to the dynamics of appropriate growth and refinement, in my opinion the responsibility for such development properly rests with the Federal courts. Whatever may be our privilege, indeed our obligation, as a common-law court to share responsibility for the evolution and responsiveness of the common law, it is not fitting that we should venture decisional contributions to the developmental processes of maritime law which is characterized by peculiarities, even idiosyncrasies. We are neither qualified by judicial experience nor, inasmuch as any decision we hand down will have no precedential significance in the Federal courts, can we be held jurisprudentially responsible for the determination which we decide to make.

Accordingly, under constraint of the present state of Federal law, I would reverse the order of the Appellate Division and deny the motion to amend the complaint.

Chief Judge Cooke and Judges Gabrielli, Wachtler and Fuchsberg concur with Judge Jasen; Judge Jones dissents and votes to reverse in a separate opinion.

Order affirmed, etc.

Supreme Court, U. S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1

AMERICAN EXPORT LINES, INC.,

Petitioner,

-against-

GILBERTO ALVEZ AND JOSEPH VINAL
SHIP MAINTENANCE, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT GILBERTO ALVEZ

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Statement

While working aboard petitioner's vessel in the territorial waters of the State of New York as a lasher, Gilberto Alvez was struck in the eye by a defective tension jack. He sustained serious injuries, including the loss of his right eye and a severe depressive reaction. He sought to amend his complaint to allege a cause of action on behalf of his wife, Juanita, for loss of her husband's consortium. This motion was denied by Special Term. On appeal, the New York State Supreme Court, Appellate Division, First Department, reversed on the law and granted the motion to amend the complaint.

The New York State Court of Appeals affirmed, permitting the cause of action of Juanita Alvez to be submitted to a jury along with that of her husband.

Historical Background

The first reported case involving the question of recovery of damages for loss of consortium under the maritime law is *New York and Long Branch Steamboat Co. v. Johnson,* 195 F 740 (3rd Cir. 1912), which permitted the husband of a passenger injured on a ship to recover damages for his wife's consortium. Fifty-one years later in *Igneri v. Cie de Transports Oceaniques,* 323 F 2d 257 (2nd Cir. 1963) the same remedy was denied the wife of an injured longshoreman. There had been no intervening decision of the Supreme Court, yet certiorari was denied. (376 US 949). The *Igneri* opinion relied on a decision of this Court in *The Harrisburg,* 119 US 199.

Seven years after the decision in *Igneri,* in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), this Court broke the shackles of *The Harrisburg* by declaring that in keeping with the liberal objectives of the maritime law it did have the power to expand the rights of maritime workers and their dependents. Having recognized the dynamic, flexible quality of the maritime law in *Moragne,* four years later this Court was called upon to decide whether the remedy for maritime wrongful death should include non-pecuniary losses such as loss of companionship and consortium, in *Sea-Land Services, Inc. v. Gaudet,* 414 US 573, 94 S.Ct. 806, 39 L.Ed. 9 (1974). Petitioner in that case argued that maritime law did not allow recovery for non-pecuniary losses. The case relied on by petitioner for that proposition was *Igneri,* the same case relied on by petitioner here. *Igneri* had held that diminution of the value of the husband's society and affections were elements too intangible to be measured by a jury. This Court rejected that view, citing with approval *New*

York and Long Branch Steamboat Co. v. Johnson, supra, and *Benedict on Admiralty,* 366 (6th Edition 1940). *Igneri* was mentioned only as holding a contrary view.

At the time of the *Gaudet* decision, 27 out of 44 states which had passed on the question allowed recovery for loss of the husband's society in personal injury cases, as opposed to 12 in 1963 when *Igneri* was decided. That majority has now swelled to 37 (A12-A13, Footnote 4).*

Both *Moragne* and *Gaudet* involved deaths which occurred within the territorial waters of a state. Last year, in *Mobil Oil Corporation v. Higginbotham,* 436 US 618 (1978), this Court was confronted with the question as to whether to allow damages for loss of consortium and society where death had occurred beyond the three-mile limit. Recovery was denied on the basis that to allow such damages would run directly contrary to the Death on the High Seas Act, 46 USC 761, which allows damages only for pecuniary losses.

The *Higginbotham* opinions, both the majority one and the dissenting opinion of Justice Marshall, make it crystal clear that loss of consortium and loss of society may be recovered for when the injury occurs within the three-mile limit, and that this determination, reached in *Gaudet,* followed both "the humanitarian policy of the maritime law" and the "clear majority of states," both of which favored recovery for loss of society. *Id.* at page 622.

After the *Gaudet* decision, a California appellate court was called upon to decide whether a longshoreman's wife should be permitted to recover damages for loss of consortium of her injured husband in *Pesce v. Summa Corp.,* 54 Cal. App. 3rd 86, 926 Cal. Rptr. 451 (1975). The holding of that court succinctly stated:

*Numbers in parentheses refer to pages in Appendix to Petition.

"Since we can perceive no logical, sound or reasonable basis to differentiate between the case where the husband is killed, as opposed to injured, in respect to the wife's entitlement to recover for loss of consortium, we conclude that Igneri has been overruled by Sea-Land Services as construed by Skidmore."

The Chief Judge of the United States District Court for the Southern District of Georgia in passing on the same issue stated:

"I am unable to see the rationality of a rule that if a defendant's negligence causes death, consortium can be recovered by the widow, but where only injury results, a wife cannot. I perceive no difference in the nature of suits for wrongful death and for tortious injury justifying so bizarre and inconsistent a result. A wife may be damaged as much as a widow by the loss of her husband's society, affection, companionship and sexual congress." *Lemon v. Bank Lines, Ltd.*, 411 F.Supp. 677 (1976)

Shortly after the *Lemon* case was decided, the Court of Appeals denied the right of the wife of a Jones Act seaman to recover for loss of her husband's consortium, in *Christofferson v. Halliburton Co.*, 534 F 2d 1147 (5th Cir. 1976). Judge Lawrence interpreted this decision as requiring him to reverse his determination in *Lemon*, even though Lemon was a longshoreman.

In August of 1976, Special Term denied Alvez' motion to amend his complaint so as to add a claim by his wife for loss of consortium, relying on *Igneri.* Thereafter, judges of the district courts in New York appear to have been about equally divided as to whether *Igneri* was overruled by *Gaudet.* Compare *Giglio v. Farrell Lines, Inc.*, 424 F.Supp. 927 (SDNY 1977), appeal denied (2nd Cir., Feb. 17, 1977) with *Westcott v. McAllister Bros., Inc.*, 463 F.Supp. 1039 (1978).

REASONS FOR DENYING THE WRIT

I

THE DECISION OF THE COURT OF APPEALS FOLLOWED THE LAW AS SET FORTH BY THIS COURT IN *SEA-LAND SERVICE, INC. v. GAUDET,* 414 US 573.

This Court in *Gaudet* clearly declared that recovery could be allowed under the maritime law for loss of consortium. If petitioner is to distinguish this case from *Gaudet,* it can only be on the basis that the law should somehow be different in a death case from that in a case where the injured person survives. Such cannot be correct, for the very reason that impelled this Court to hold as it did, not only in *Gaudet,* but in *Moragne* and *Higginbotham* as well.

In *Moragne* this Court, in holding that there was a right to recover for death in a case otherwise governed by the General Maritime Law, held that the *primary* wrong giving rise to the remedies was the injury caused to the decedent. Thus, the Court stated, 398 US at pages 381-382.

"Where existing law imposes a primary duty violations of which are compensable if they cause injury, nothing in ordinary notions of justice suggests that a violation should be non-actionable simply because it was serious enough to cause death. On the contrary, that rule has been criticized ever since its inception, and described in such terms as 'barbarous', e.g., *Osborne v. Gillett,* 9 L.R. Exch. 88, 94 (1873) (Lord Bramwell, dissenting); Pollock, *The Law of Torts* 55 (Landon ed. 1951); 3 Holdsworth, *History of English Law,* 676, 677 (3rd ed. 1927). Because the primary duty already exists, the decision whether to allow recovery for violations causing death is entirely a remedial matter."

The Court went on to state that since the primary source was the injury to the person itself, whether the person lived or died was only a matter of remedy deriving secondarily from the primary cause. It found no difficulty in altering the remedy so as to give, by necessary logic, the same remedy that would otherwise have been given in ther event the injury were not fatal.

In *Moragne* the Court did not specify all the damages that would be recoverable by reason of the primary injury, but in *Gaudet* the Supreme Court stated specifically that included in the right of loss of society granted in a fatal case was the right to recover for the loss of consortium. Again, bearing in mind what was stated in *Moragne,* this right could only exist as the right also existed in a non-fatal case. Indeed, as pointed out above, the petitioner in *Gaudet* argued that maritime law did not allow recovery for non-pecuniary losses, relying on *Igneri.*

Curiously, petitioner's brief acknowledges the close relationship between loss of consortium in death cases and in personal injury cases (pp. 16-17) and the fact that the Second Circuit drew analogical support from the lack of such a remedy in death cases. But petitioner's argument will not withstand logical scrutiny in the face of *Gaudet.* Permitting recovery for loss of consortium where a longshoreman or harbor worker is killed while denying it when he is maimed would be utterly illogical and unjust.

POINT II

THE COURT OF APPEALS WAS NOT BOUND TO FOLLOW *IGNERI,* BECAUSE IT IS NOT CONTROLLING FEDERAL LAW TODAY.

Thirty-eight years ago this Court was called upon to decide whether or not a cause of action for maritime personal injuries survived the death of the tort feasor, where the tort occurred within the territorial waters of a state whose law permitted survival of causes of action for personal injuries. In holding that the principle of non-survival was not so strongly entrenched in the maritime law as to compel ignoring the state law, Chief Justice Hughes observed:

> " . . . With respect to maritime torts we have held that the State may modify or supplement the maritime laws by creating liability which a court of admiralty will recognize and enforce when the state action is not hostile to the characteristic features of the maritime law or inconsistent with federal legislation . . ." *Just v. Chambers,* 312 US 383, 388, 61 S.Ct. 687, 691.

Assuming arguendo that *Moragne* and *Gaudet* did not overrule *Igneri,* what did this Court have to say about the general policy of the maritime law?

> "It better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules." *Sea-Land Services, Inc. v. Gaudet,* 414 US 573, 583.

Counsel for respondent and third-party defendant Vinal has suggested that the petition raises a first impression reverse *Erie R. Co. v. Tompkins,* 304 US 64 question. Under the doctrine of *Erie,* federal courts must follow the decisions of a state's highest court. In the absence of a ruling by the state's highest court, a federal court will be bound by the ruling of an

intermediate court, unless there is persuasive evidence that the state's highest court would reject that ruling. *West v. American Telephone & Telegraph Co.*, 311 US 223 (1940), 61 S.Ct. 179. The opinion of the intermediate appellate court does not necessarily represent binding authority, even though the state's highest court has denied certiorari. *Graham v. White-Phillips Co.*, 296 US 74 (1935), 56 S.Ct. 15. Difficulty in determining what the state courts may thereafter determine the state law to be do not provide a reason for the federal court to deny jurisdiction. *Meredith v. City of Winter Haven*, 320 US 228 (1943), 64 S.Ct. 7.

When a federal court must determine state law, it should not slavishly follow lower court or even upper court decisions but ought to consider all the data the highest court of the state would use. *Roginsky v. Richardson-Merrell, Inc.*, 378 F 2d 832, 851 (2nd Cir. 1967), citing Corbin, *The Laws of the Several States*, 50 Yale L.J. 762 (1941). Even a determination by the highest court of a state need not necessarily bind a federal court, where later developments make it apparent that the decision no longer represents the law of the state. *Evans v. S.J. Groves & Sons Co.*, 315 F 2d 335, 341-345 (2nd Cir. 1963).

Finding a lack of unanimity among decisions concerning the question (A11) the court below properly examined the ratio decidendi of *Igneri* to see if it was still valid today (A12). In his opinion in *Igneri*, Judge Friendly assigned three principal reasons for denying Mrs. Igneri's claim:

1. The lack of any clear common-law trend to allow such claims (323 F 2d 260-263).

2. The assertion that the damages which might be recovered are:

(a) parasitic in nature (id 263)

(b) too personal, intangible and conjectural to be measured in pecuniary terms by a jury (264).

3. The failure of the maritime law to recognize a claim for injury to the right of consortium either by the wife of a Jones Act seaman or by his widow (id 266-267).

1. The Common Law

In his opinion, written 16 years ago, Judge Friendly noted that maritime law applied, and that when there are no clear precedents in the law of the sea, that admiralty judges often look to the law prevailing on the land. He said, 323 F 2d at page 260:

> ". . . At least this much is true. If the common law recognized a wife's claim for loss of consortium, uniformly or nearly so, a United States admiralty court would approach the problem here by asking itself why it should not likewise do so; if the common law denied such a claim, uniformly or nearly so, the inquiry would be whether there was sufficient reason for an admiralty court's nevertheless recognizing one. Compare the Harrisburg, 119 US 199, 213-214, 7 S.Ct. 140, 30 L.Ed. 358 (1886). So we turn to the common law."

Seven years after these words were written, this Court in *Moragne* expressly overruled the *Harrisburg*. The underpinnings of *Igneri*, if not destroyed, were certainly badly weakened.

Judge Friendly's analysis in *Igneri* considered the fact that since a wife's right to recover for loss of her husband's consortium was first enunciated by the United States Court of Appeals for the District of Columbia in *Hitaffer v. Argonne Co.*, 183 F 2d 711, 87 US App. D.C. (1950), only 11 states[1] had followed suit, whereas 19 others[2] who had considered the question since 1950 had refused. It had been rejected by the Court of Appeals

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1. Arkansas, Delaware, Georgia, Illinois, Iowa, Michigan, Missouri, South Dakota, Montana, Nebraska and Oregon.

2. Alabama, Arizona, California, Colorado, Connecticut, Florida, Kansas, Kentucky, Maryland, New Hampshire, New Jersey, New York, Oklahoma, Pennsylvania, South Carolina, Texas, Washington, West Virginia and Wisconsin.

for the State of New York, *Kronenbitter v. Washburn Wire Co.*, 4 NY 2d 524 (19). It was not the view expressed by the *Restatement of Torts.* Finding no evidence that the common law clearly authorized a wife's recovery, he found no reason for an admiralty court's nevertheless recognizing one.

How different the situation is today. A wife's right to recover damages for tortious invasion of her consortium is now recognized by 35 of the 50 states, as well as the District of Columbia, the Virgin Islands, and the territory of Puerto Rico.[3] Only six states which have considered the issue still deny the remedy.[4]

Today the *Restatement of Torts,* Second, recognizes *Hitaffer* as the prevailing view, contrary to its position when *Igneri* was decided. See Section 693, comment d, page 496.

2. The Nature of the Damages.

In *Millington v. Southeastern Elevator Co.*, 22 NY 2d 498, 507 (19), the New York State Court of Appeals commented:

> "It is also contended that the 'sentimental' damages such as the diminution of the value of her husband's society and affection and the deprivation of sexual relations and the attendant loss of child-bearing opportunity are too personal, intangible and conjectural to be measured in pecuniary terms by a jury. This argument has no merit. The logic of it would also hold a jury incompetent to award damages for pain and suffering."

This Court, in *Sea-Land Services v. Gaudet, supra,* 414 US 573, 588-590 put to rest the argument that such damages are too speculative to be measured.

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3. The court below listed 34 states (A12-A13 Footnote 4). In addition, Hawaii, *Nishi v. Hartwell,* 473 P 2d 116 (Sup. Ct. of Hawaii 1970); Puerto Rico, Gonzales v. Fireman's Fund Ins. Co., 385 F.Supp. 140 (D.C. Puerto Rico 1974); Virgin Islands, *Hubschman v. Antilles Airboats, Inc.*, 440 F.Supp. 828 (1977).

4. Connecticut, Kansas, South Carolina, Washington, West Virginia and Louisiana.

POINT III

THE DECISION BELOW DID NOT DESTROY ANY UNIFORM PATTERN OF THE MARITIME LAW WITH RESPECT TO THE RECOVERY OF DAMAGES.

With the decision of this Court in *Higginbotham,* it has become apparent to even a casual observer that uniformity is an illusory goal where remedies for seamen and harbor workers injured or killed aboard ship is concerned. When a worker is killed beyond the three-mile limit, his survivors are restricted to pecuniary losses, but where death occurs within the territorial waters of a state the liberal doctrine of *Moragne* applies. This naturally favors the survivors of longshoremen and harbor workers, who work on the territorial waters. On the other hand, the remedy for breach of the duty to provide a seaworthy vessel extends to Jones Act seamen, but not to longshoremen and harbor workers. *Pub. L. 92-576, 86 Stat. 1251.*

More and more, attorneys representing injured longshoremen are seeking new defendants on whom to fasten blame. Where latent defects of ship's gear or even of cargo-handling equipment provided by the stevedore causes injury or death, this formerly gave rise to a remedy against the vessel. *Alaska Steamship Co. v. Petterson,* 347 US 396. Now, the only remedy for a latent defect will be a products liability claim against the manufacturer or supplier. Such a claim would be governed by state law, and, as mentioned above under Point II, the overwhelming majority of states permit recovery for loss of a husband's consortium. Claims in the same suit are often asserted against the vessel owner and against other defendants, such as manufacturers and suppliers and independent contractors. Consider the confusion in instructing a jury where different measures of damages apply against different defendants

for the same injury. Uniformity is promoted by bringing the maritime law in line with the *Restatement* and the clear majority of the states.

The case principally relied on by petitioner for the proposition that wives of Jones Act seamen cannot recover for loss of their husband's consortium is *Christofferson v. Halliburton Co.*, 534 F 2d 1145 (5th Cir. 1976), which involved injuries sustained by the husband while working as a seaman in Federal waters off the Louisiana coast. The decision was by a divided court, with a strong dissenting opinion. Rehearing was denied, with four judges dissenting, 542 F 2d 1174.

Two things in particular are interesting to note about the majority opinion in *Christofferson*. The first is that in order to deny Mrs. Christofferson a remedy for loss of her husband's consortium, the majority found it necessary to declare that no such remedy exists under the law of Louisiana, 534 F 2d at page 1151. The implication is clear that had Christofferson been injured in New York, which permits a wife to recover such damages, Mrs. Christofferson would have been allowed to maintain her action.

The second aspect of the majority opinion in *Christofferson* which is of interest is that the court mentions its prior endorsement of *Igneri* in the case of *Canal Barge Co., Inc. v. Griffith*, 480 F 2d 11 (5th Cir. 1973),[5] a case decided after *Moragne* and before *Gaudet* in which the Fifth Circuit refused to allow damages for loss of consortium in a maritime wrongful death claim. Denial was based on *Igneri*, the Court stating, 480 F 2d at page 31:

> ". . . Igneri v. Cie de Transports Oceaniques, 323 F 2d 257, established that in actions under general maritime law to recover for personal injuries caused by both negligence and unseaworthiness, the spouse may not recover for loss of consortium, which was defined as 'the mutual right of

5. 534 F 2d at page 1149.

> the marriage partners to each other's society, companionship, and affection, including sexual intercourse' . . . "

There could hardly be a clearer statement that loss of consortium of a living spouse and that of a deceased one are inextricably interwoven. Before the appellate process was exhausted in *Canal Barge*, this Court handed down its decision in *Gaudet*. On rehearing, the Fifth Circuit remanded *Canal Barge* for a rehearing for determination of damages for loss of consortium, 573 F 2d 911 (1975).

The majority in *Christofferson* not only ignored the fact that their 1973 opinion in *Canal Barge*, which had relied so strongly on *Igneri*, was overruled by *Gaudet*, they stretched logic beyond its limits in rejecting appellants' arguments that *Igneri* had been shorn of its vitality by *Gaudet* and by the dramatic change in the common law over the intervening thirteen years. They quickly forgot how strongly they had relied on *Igneri* three years earlier in denying to a widow damages for loss of consortium. Instead, they seized upon two sentences from the *Gaudet* opinion, sentences quoted at page 7 of petitioner's brief, as standing for the proposition that no right could arise for a wife to recover for loss of consortium until the injured longshoreman died.

The dissenting opinion of Judge Freeman quite accurately pointed out that the majority was reading too much into language which intended only to emphasize that the verdict which the deceased Gaudet had recovered before his death could not have encompassed those damages which were personal to the survivors. 583 F 2d at 1153-1154. The language in question, although incorporated in the *Gaudet* opinion immediately after the discussion of loss of society, probably refers more to accural of the individual items of compensable loss included within that cause of action. Moreover, the Court's discussion of "loss of society" and decisions recognizing an in-

dependent action for "loss of consortium" indicates a clear awareness that the latter cause of action, if otherwise permissible, could clearly arise during the decedent's lifetime:

> "Juries are often called upon to measure damages for pain and suffering, mental anguish in disfigurement cases, or intentional infliction of emotional harm. In fact, since the 17th century, juries have assessed damages for loss of consortium — which encompasses loss of society — in civil actions brought by husbands whose wives have been negligently injured. More recently, injuries have been asked to measure loss of consortium suffered by wives whose husbands have been negligently harmed." 414 US 589-590, 94 S.Ct. at 814.

The recovery for "loss of consortium" referred to clearly arises when husbands or wives are negligently "injured" or "harmed" and not merely when they are negligently killed.

As to the fact that 37 states[6] out of 44 who have considered the question have now declared the wife's right to recover for loss of her husband's consortium, the language quoted in defendant-appellant's brief would appear to urge that 85% does not constitute near uniformity, or, as suggested at page 267 of Judge Friendly's opinion, clear authority. One simple answer to that contention is that this Court in *Gaudet* found that 27 out of 44 states which allowed recovery for loss of society constituted a "clear majority." This Court reasoned that allowing such a recovery under the maritime law was "compelled" by the humanitarian policy of the maritime law and by the fact that a clear majority of states recognized the right. 414 US pp. 587-588.

But the majority in *Christofferson* does not seem to argue that the number of states recognizing the right constitutes less

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6. Actually 35 states, the District of Columbia, and the Virgin Islands.

than substantial uniformity. Instead, they appear to rely on the narrow claimed distinction that because the change has been accomplished in many states by statutory modification, that law is not truly the "common law." Judge Lasker addressed that contention in *Giglio,* 424 F.Supp. at page 930:

> "With due respect for the Fifth Circuit's analysis, we believe it unlikely that the Igneri court meant to examine the 'common law' in the narrow sense of judge-made law only. Indeed, in Judge Friendly's discussion of the twelve jurisdictions that recognized the right of a wife to recover for loss of consortium, he noted that one had done so by statute. 323 F2d at 260. Moreover, at its outset the opinion asserts that where clear precedents in the law of the sea are lacking, maritime law may look to the law prevailing in the land. Id. at 259. Judge-made law was not distinguished from statutory enactments and there seems little reason to apply such limitation.

Clearly, the decision of the New York State Court of Appeals does not in any way disturb any uniform pattern of remedy of the maritime law.

CONCLUSION

The petition for writ of certiorari should be denied.

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Opinions Below

The unreported opinion of the Supreme Court of the State of New York, County of New York, is printed in appendix A to the petition, p. A 1.

The opinion of the Supreme Court of the State of New York, Appellate Division, First Judicial Department, is reported at 59 A.D. 2d 883, 399 N.Y.S. 2d 673, and is printed in appendix B to the petition, pp. A 4-5.

The opinion of the Court of Appeals of the State of New York is reported at 46 N.Y. 2d 634, 415 N.Y.S. 2d 979, and is printed in appendix D to the petition, pp. A 8-19.

Jurisdiction

The final judgment* and remittitur of the Court of Appeals of the State of New York, copy appended hereto, was filed in the court of original instance, pursuant to New York CPLR 5524(b), on April 5, 1979, and the petition for certiorari was filed less than ninety days later, on July 2, 1979.

Jurisdiction is properly invoked under 28 U.S.C. 1257(3).

Questions Presented

1. When determining whether a claim exists under the general maritime law, are state courts bound by the decision of a federal court of appeals if there is no decision by this Court?

2. Under the general maritime law, does the wife of a harbor worker who is tortiously injured aboard a ship in territorial waters of the United States have a damages claim against the ship's owner for her lost consortium resulting from her husband's injury?

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* In addition to being procedurally final, the disposition satisfies both the third and fourth categories of finality explicated in *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 481-483 (1975).

Statement

Respondent Alvez, a harbor worker, sued in New York County Supreme Court to recover damages from petitioner American Export Lines on general maritime law claims of negligence and unseaworthiness for injury which he sustained aboard petitioner's ship while docked in Brooklyn, N.Y. Petitioner impleaded respondent Joseph Vinal Ship Maintenance, Inc. for indemnity.

Alvez moved to amend his complaint to allege a damages claim against petitioner for his wife's lost consortium resulting from his injury. The New York County Supreme Court denied the motion on authority of *Igneri v. Cie. de Transports Oceaniques,* 323 F. 2d 257 (2 Cir. 1963), cert. den. 376 U.S. 949 (1964), which specifically holds that such a claim does not exist under the general maritime law. The Appellate Division of the New York Supreme Court reversed the denial, relying on *Sea-Land Services, Inc. v. Gaudet,* 414 U.S. 573 (1974), which holds that the widow of a deceased harbor worker has a valid damages claim under general maritime law against a ship's owner for lost consortium resulting from her husband's fatal injury aboard ship while in U.S. territorial waters, therein contrasting its decision with *Igneri,* which the Court did not explicitly overrule, and on *Pesce v. Summa Corp.,* 54 C.A. 3d 86, 126 Cal. Rptr. 451 (2nd Dist. 1975), holding diametrically contrary to *Igneri,* which the intermediate California Court opined "has been overruled by *Sea-Land Services* [*v. Gaudet*] as construed by *Skidmore*" [*v. Grueninger,* 506 F. 2d 716 (5 Cir. 1975)], a wrongful death action by the husband of a motor

boat passenger who was killed when the boat collided with a barge, holding that the husband can recover damages for loss of his wife's consortium, which neither cited nor had any occasion to distinguish *Igneri.*

The New York Court of Appeals, one Judge dissenting, affirmed the Appellate Division on the ground that "the *ratio decendendi* of the *Igneri* decision reveals an erosion of its theoretical underpinnings so severe as to precipitate its collapse under its own weight", citing as "the law of the land" a string of state court cases which recognize a wife's statutory or common law claim for lost consortium due to her husband's injury, and *Sea-Land Services, Inc. v. Gaudet,* despite being "cognizant that the Fifth Circuit has interpreted *Gaudet (supra)* as limited to authorizing recovery for loss of consortium under the general maritime law to wrongful death actions", referring to *Christofferson v. Halliburton Co.,* 534 F. 2d 1147, reh. en banc den. 542 F. 2d 1174 (5 Cir. 1976), which, largely on authority of *Igneri,* holds that the wife of a seaman injured in U.S. territorial waters has no claim for lost consortium under the Jones Act, 46 U.S.C. 688, or general maritime law.

Reasons For Granting The Writ

The petition raises a vital, first impression reverse *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938), question "touching the accommodation of state and federal interests under the Constitution", *cf., Kosydar v. National Cash Register Co.,* 417 U.S. 62, 65 (1974), and the "imperative doctrine" of "the uniformity and supremacy of the maritine law", *Kossick v. United*

Fruit Co., 365 U.S. 731, 738 (1961). In "too broadly", *cf., Oregon v. Mathiason,* 429 U.S. 492, 493 (1977), holding that a widow's consortium claim sanctioned by *Sea-Land Services, Inc. v. Gaudet* "carries over", *cf., Republic Steel v. Maddox,* 379 U.S. 650, 652 (1965), to a wife's consortium claim, the New York Court of Appeals has decided an important Federal question contrary to *Christofferson v. Halliburton Co.,* 534 F. 2d, p. 1151, n. 1, which should be settled by this Court because of its "'responsibility for fashioning the controlling rules of admiralty law.'" *United States v. Reliable Transfer Co.,* 421 U.S. 397, 409 (1975).

The New York Court of Appeals recognized that it was in the reverse *Erie R. Co. v. Tompkins* situation of seeking the answer to a general maritime law question; "an answer obtainable solely by recourse to Federal law." (pet. p. A 11). Under the *Erie* doctrine analogous to that situation, the New York Court's function was "to ascertain and apply that law even though it has not been expounded by the highest court", and the New York Court "was not at liberty to reject those decisions merely because it did not agree with their reasoning", *Fidelity Trust Co. v. Field,* 311 U.S. 169, 177, 179 (1940), or free to apply "what it considered to be the better rule", *West v. A.T. & T. Co.,* 311 U.S. 223, 235 (1940), "in the absence of convincing evidence that the highest court * * * would decide differently." *Stoner v. New York Life Ins. Co.,* 311 U.S. 464, 467 (1940).

Contravening those mandates, the New York Court sought "a uniform Federal rule albeit one established by lower Federal courts" (pet. p. A 11); "any estab-

lished and inflexible rule barring recognition of the claim before us." (pet. p. A 17). That search disclosed the only Federal court decision which, contrary to the principle of *stare decisis,* refused to abide *Igneri* on the ground of conjectured obsolescence, *Giglio v. Farrell Lines, Inc.,* 424 F. Supp. 927, 930 (S.D.N.Y. 1977), app. den. (2 Cir. No. 77-8014, 2/17/77)*; *cf., Westcott v. McAllister Bros., Inc.,* 463 F. Supp. 1039 (S.D.N.Y. 1978), a later decision by the same Court relying on *Igneri.* The search also led to the previously cited California Court opinion in *Pesce v. Summa Corp.,* which the New York Court found more appealingly in accord with its own rationale in *Millington v. Southeastern Elevator Co.,* 22 N.Y. 2d 498, 293 N.Y.S. 2d 305 (1968). The irony of any reliance on *Pesce,* which misconceived that *Igneri* had been overruled by *Skidmore v. Grueninger,* 506 F. 2d 716 (5 Cir. 1975), is that 7 months after *Pesce,* the Fifth Circuit Court of Appeals in *Christofferson* rejected the "argument that *Igneri* would now be decided differently" and distinguished its earlier decision in *Skidmore* on the ground that it "involved a wrongful death claim", 534 F. 2d, pp. 1150, 1151, n. 1.

Instead of ascertaining the general maritime law by the analogous *Erie* rule so as to preserve the essential uniformity of that law and prevent the same sort of forum conflicts and consequent unequal protection of the law which motivated *Erie,* the New York Court searched for rogue opinions and declined

* The Circuit Court's refusal "to review the lower court's decision" was not "clear and persuasive indication that its pronouncement [in *Igneri*] will be modified, limited or restricted." *West v. A.T. & T. Co.,* 311 U.S., pp. 236, 237.

to follow *Igneri* despite *Christofferson,* both of which it deemed to have been wrongly decided and eroded by "the law of the land" as enunciated by New York, California, and most other states. Thus, until this Court otherwise declares, the general maritime law in New York on whether the wife of an injured harbor worker has a valid claim for her lost consortium depends on the forum. If the suit is in a State court, then the decision below governs. But if the suit is in a Federal court in New York, then, as dissenting Judge Jones noted, "any decision we hand down will have no precedential significance in the Federal courts" (pet. p. A 19), as is proven by the recent memorandum order in *Manolakis v. Indo Pacific Carriers* (S.D.N.Y. No. 78 Civ. 1075, 6/26/79), copy appended hereto.

This existing, and potentially growing, unconstitutional chaos can only be eliminated by this Court, the sooner the better. If wives of injured harbor workers have valid general maritime law claims for lost consortium, they should be able to enforce those claims in any court of competent jurisdiction, Federal or State. And if they do not, then defendants should not be held liable for those claims because the particular forum unlawfully chooses to allow them.

Conclusion

The petition should be granted.

Respectfully submitted,

PETER M. PRYOR
WILLIAM M. KIMBALL
Counsel

New York, N.Y.
July 26, 1979

Court of Appeals
State of New York

The Hon. Lawrence H. Cooke, Chief Judge, Presiding

1 No. 113

Gilberto Alvez,

Respondent,

vs.

American Export Lines, Inc.,

Appellant,

vs.

Joseph Vinal Ship Maintenance, Inc.,

Third-Party Respondent.

The appellant(s) in the above entitled appeal appeared by Haight, Gardnner, Poor & Havens;
the respondent(s) appeared by Paul C. Mathews.

The Court, after due deliberation, orders and adjudges that the order is affirmed, with costs. Question certified answered in the negative. Opinion by Jasen, J. Concur: Cooke, Ch.J., Gabrielli, Wachtler and Fuchsberg, JJ. Jones, J., dissents and votes to reverse in an opinion.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, New York County,

there to be proceeded upon according to law.

CO. CLERK'S OFFICE
NEW YORK
APR 5 - 1979

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

Joseph W. Bellacosa

Joseph W. Bellacosa, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, April 3, 19 79

33

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NICHOLAS and KETTY MANOLAKIS,

Plaintiffs,

-against-

INDO PACIFIC CARRIERS, INC. and GROTON PACIFIC CARRIERS, INC.,

Defendants.

78 CIV 1075 (LBS)

MEMORANDUM

U.S. DISTRICT COURT FILED JUN 27 1979 S.D. OF N.Y.

SAND, D.J.

Defendants' motion to dismiss the cause of action asserted by plaintiff Ketty Manolakis for loss of consortium and society of her husband is granted. Westcott v. McAllister Bros., Inc., 463 F.Supp. 1039 (S.D.N.Y. 1978).

Plaintiff's oral application for certification pursuant to 3 U.S.C. § 1292(b) of the question whether a cause of action for loss of consortium lies where the husband seaman sues under the Jones Act, 46 U.S.C. § 688 is denied. Although it cannot be denied that there are "substantial grounds for difference of opinion" as required by 28 U.S.C. § 1292(b) (cf. Alvez v. American Export Lines, Inc., New York Court of Appeals, April 3, 1979), the Second Circuit has already declined one application to consider a like question on certification. Giglio v. Farrell Lines, Inc., 424 F.Supp. 927 (S.D.N.Y. 1977), pet. for leave to app. den., No. 77-8014 (2d Cir. Feb. 17, 1977).

MICROFILM JUN 28 1979

SO ORDERED.

Dated: New York, New York
June 26, 1979

U.S.D.J.

Supreme Court, U. S.
FILED
DEC 13 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1

AMERICAN EXPORT LINES, INC.,

Petitioner,

v.

GILBERTO ALVEZ and
JOSEPH VINAL SHIP MAINTENANCE, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

BRIEF FOR THE PETITIONER

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December, 1979

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In the

Supreme Court of the United States

October Term, 1979

No. 79-1

American Export Lines, Inc.,

Petitioner,

v.

Gilberto Alvez and
Joseph Vinal Ship Maintenance, Inc.,

Respondents.

ON WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

BRIEF FOR THE PETITIONER

Opinions Below

The opinion of Justice Bernard Nadel of the New York State Supreme Court, Special Term, New York County, which denied the plaintiff's motion to amend his complaint to add his wife as a party plaintiff in a cause of action for loss of consortium, is not reported, and is printed in the Appendix, A, at A1.

The opinion of the New York State Supreme Court, Appellate Division, First Department, which reversed Justice Nadel's decision and granted the motion to amend the complaint is reported at 59 App. Div. 2d 883, 399 N.Y.S. 2d 673 (1st Dep't 1977) and is printed in the Appendix, B,

at A2-A5. The order of the New York State Supreme Court, Appellate Division, First Department, granting the motion of American Export Lines, Inc. to appeal to the New York State Court of Appeals is not reported, and is printed in the Appendix, C, at A6-A7.

The opinion of the New York State Court of Appeals, which, in a 5-1 decision, affirmed the decision of the New York State Supreme Court, Appellate Division, First Department, is reported at 46 N.Y.2d 634, 389 N.E.2d 461, 415 N.Y.S.2d 979 (1979), and is printed in the Appendix, D, at A8-A19.

Jurisdiction

The judgment of the New York State Court of Appeals was entered on April 3, 1979. The petition for certiorari was filed on July 2, 1979, and was granted on October 29, 1979. This brief was filed within forty-five days from that date.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3). [See also Supreme Court Rule 19(1)(a).]

Questions Presented

In *Sea-Land Services, Inc.* v. *Gaudet,* 414 U.S. 573 (1974) this Court permitted the recovery of damages for loss of society in a *Moragne* v. *States Marine Lines, Inc.,* 398 U.S. 375 (1970) wrongful death cause of action under the General Maritime Law. Following this decision, some lower courts have construed *Gaudet* as applicable in maritime personal injury actions. The questions presented are:

1. Whether loss of consortium damages may be recovered in maritime personal injury actions, when such recovery

has been precluded by the Jones Act, the Federal Employers' Liability Act, the Death on the High Seas Act, and the pre-*Gaudet* decisions in maritime injury actions?

2. Whether the pre-existing uniformity in the Federal Maritime Law should be abrogated by permitting such non-pecuniary recovery to the spouse of an injured maritime worker?

3. Whether an unfair, anomalous, and wholly unnecessary distinction should be created in the Federal Maritime Law, which denies loss of consortium damages to the spouse of an injured seaman, so as to permit recovery to the spouse of an injured harbor worker, a surrogate seaman, whose maritime rights have historically been derived from his prototype, the true seaman?

4. Whether the New York Court of Appeals, or any state court, should be permitted to reject the precedential authority of the federal appellate courts when deciding an issue of Federal Maritime Law?

Statutes Involved

Death on the High Seas Act
41 Stat. 537, 46 U.S.C. §761

Right of action; where and by whom brought

> Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States,

in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

Death on the High Seas Act
41 Stat. 537, 46 U.S.C. §762

Amount and apportionment of recovery

The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

Federal Employers' Liability Act
35 Stat. 65; 53 Stat. 1404, 45 U.S.C. §51

Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such

employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Jones Act
38 Stat. 1185; 41 Stat. 1007, 46 U.S.C. §688

Recovery for injury to or death of seaman

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under

the court of the district in which the defendant employer resides or in which his principal office is located.

Longshoremen's and Harbor Workers' Compensation Act
44 Stat. 1426, 33 U.S.C. §905

Exclusiveness of liability (Prior to 1972 Amendments)

The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee.

Longshoremen's and Harbor Workers' Compensation Act
44 Stat. 1426; 86 Stat. 1263, 33 U.S.C. §905

Exclusiveness of liability (Subsequent to 1972 Amendments)

(a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, de-

pendents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the

time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

Statement

Gilberto Alvez, a seaman on vacation, was moonlighting as a lasher-employee of respondent Joseph Vinal Ship Maintenance, Inc. In doing so, he lost an eye while working aboard the SS EXPORT BUILDER, a vessel owned by petitioner American Export Lines, Inc., on October 13, 1972. He brought suit for negligence and unseaworthiness against the shipowner, which in turn impleaded Joseph Vinal Ship Maintenance, Inc.[1]

Alvez subsequently moved to amend his complaint to add his wife as a party plaintiff in a cause of action for loss of consortium. This motion was summarily denied by Justice Bernard Nadel of the New York State Supreme Court. (App. A, at A1). On appeal, the New York State Supreme Court, Appellate Division, First Department, reversed on the law and granted the motion to amend the complaint. (App. B, at A2-A5). Subsequently, that court permitted American Export Lines, Inc. leave to appeal to the New York State Court of Appeals, certifying a question to that court for resolution. (App. C, at A6-A7).

The New York State Court of Appeals, in a 5-1 decision, affirmed the New York State Supreme Court, Appellate Division, First Department, and permitted the cause of action

[1] The employer third-party was impleaded prior to the effective date of the 1972 Amendments to the Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.*, which *inter alia*, eliminated the longshoreman's cause of action for unseaworthiness.

for loss of consortium damages to stand, asserting that the Federal Maritime Law on this question was unsettled. (App. D, at A8-A19).

Summary of Argument

In *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970), this Court created a wrongful death cause of action under the General Maritime Law. The Court left open to future cases the determination of damages permitted under this federal remedy. There then ensued some confusion in the lower courts as to the proper measure of damages to be applied. Next, this Court decided *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573 (1974), wherein the *Moragne* wrongful death remedy was expanded so as to include a claim for loss of consortium by the widow of a longshoreman who died after having been injured within territorial waters.[2] Subsequently, in *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618 (1978) the Court held that *Gaudet* damages could not be recovered in a wrongful death cause of action governed by the Death on the High Seas Act (hereinafter referred to in the Brief as "DOHSA") since that statute limits recovery to "pecuniary loss."

It is against this backdrop of wrongful death remedy and consequent damages that the present facile effort was made to transplant the rights of a widow to a personal injury action. This Brief will address this attempt as an unwarranted qualitative, rather than a quantitative leap.

[2] The terms "loss of society" and "loss of consortium" have been used interchangeably throughout this Brief. As this court noted in *Gaudet*, 414 U.S. at 589, loss of consortium "encompasses loss of society." The Court defined loss of society as the "broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort, and protection." *Id.* at 585 (footnote omitted).

I

The landmark decision of the Second Circuit in *Igneri* v. *Cie. de Transports Oceaniques,* 323 F.2d 257 (2d Cir. 1963), *cert. denied,* 376 U.S. 949 (1964) denied loss of consortium recovery to the spouse of an injured longshoreman. Judge Friendly, after studying the common law on the subject, relied heavily on the fact that the spouse of an injured seaman could not recover loss of consortium damages under Federal Maritime Law as expounded by Congress in the Jones Act. Despite the fact that a majority of states now permit recovery by the wife for loss of her husband's consortium, *Igneri's* rationale, bottomed on the analogous Jones Act, is today the best exposition of the Federal Maritime Law.

The *Igneri* court also considered the Federal Employers' Liability Act (hereinafter referred to in the Brief as "FELA"), "the regime which the Jones Act made applicable to seamen," and which had been "authoritatively construed before the Jones Act was passed." *Id.* at 266. FELA provided the uniform and exclusive method of recovery for damages sustained as a result of injury to a railway employee, and also uniformly denied consortium recovery to the spouse. Since Congress did not permit such recovery under either the Jones Act or FELA, the *Igneri* court concluded that it would be anomalous to permit such recovery to a longshoreman, as such would indeed result in "capricious differences in treatment between similarly situated persons." *Id.* at 267.

The *Igneri* rule denying consortium recovery to the spouse of an injured maritime worker, irrespective of the sex of such worker, was uniformly followed until the decision of this Court in *Gaudet,* a wrongful death case. Indeed, it should be noted that *Gaudet* has no applicability to a personal injury cause of action. The decision in

Gaudet explained the remedies available under the *Moragne* maritime wrongful death remedy, and created no inference that such a holding should be extended beyond the scope of a wrongful death situation. In delineating the damages recoverable thereunder, the Court specifically noted that such losses "could not accrue until the decedent's death." 414 U.S. at 592.

Notwithstanding such limiting language, lower state and federal courts began to split as to the maintainability of such a cause of action. However, the only federal appellate court to squarely face the issue subsequent to *Gaudet,* the Fifth Circuit in *Christofferson* v. *Halliburton Co.,* 534 F.2d 1147 (5th Cir.), *rehearing en banc denied,* 542 F.2d 1174 (5th Cir. 1976) found the *Igneri* rule still valid and denied consortium recovery to the spouse of an injured seaman. Therefore, the only two federal appellate courts to specifically address the issue of loss of consortium recovery by the spouse of an injured maritime worker—*Igneri* eleven years before *Gaudet* and *Christofferson* two years after *Gaudet*—both denied such recovery. In sum, *Gaudet* has left undisturbed the Federal Maritime Law on the damages recoverable in a maritime personal injury action, though boiling the waters of uniformity.

Since the policies underlying *Gaudet* have their bases in wrongful death cases and statutes, their applicability should be limited thereto. Therefore, the uniformity which existed in this area of Federal Maritime Law governing personal injury cases prior to the decision in *Gaudet* should be reinstated by this Court.

II

In the vast majority of maritime wrongful death cases, the Federal Maritime Law precludes recovery for non-pecuniary damages. The Jones Act has been consistently

interpreted both prior and subsequent to *Gaudet*, as permitting recovery only for the pecuniary loss suffered by the seaman or his designated beneficiaries. Additionally, this Court in *Higginbotham*, by affording no different treatment to the Jones Act seamen involved therein, implicitly affirmed such a construction of the Jones Act in a wrongful death case. *Ivy* v. *Security Barge Lines, Inc.*, 585 F.2d 732, 738 (5th Cir. 1978), *rehearing en banc*, No. 76-4130 (5th Cir., Nov. 13, 1979).

Similarly, FELA has long been interpreted as precluding recovery for nonpecuniary damages in a wrongful death action. *Michigan Central Railroad* v. *Vreeland*, 227 U.S. 59 (1913). Numerous other decisions by this Court, and by federal and state courts have uniformly denied recovery of nonpecuniary damages in FELA wrongful death actions.

DOHSA, by its statutory language, limits recovery to the "pecuniary loss sustained." This Court in *Higginbotham* explicitly affirmed the validity of such a provision.

The only maritime death cases wherein nonpecuniary damages have been recovered are post-*Gaudet*, non-Jones Act, non-FELA, non-DOHSA cases. Prior to *Gaudet*, nonpecuniary damages, such as loss of consortium, had uniformly been denied. Following the *Gaudet* mandate, decisions have permitted such recovery in death cases under the General Maritime Law, although noting that nonpecuniary recovery was still precluded by the Jones Act.

In light of the statutory and judicial preclusion of such nonpecuniary damages under the Jones Act, FELA, and DOHSA, the *Gaudet* decision permitting such recovery in General Maritime Law wrongful death cases has restored nonuniformity in this area of Federal Maritime Law, without substantial reason therefor.

III

In *Moragne*, this Court created a wrongful death cause of action under the General Maritime Law, carefully noting that there was no evident Congressional policy precluding such recovery. When the Court left open to future cases the determination of the specific recoveries to be permitted under this federal remedy, there was some confusion in the lower courts as to the proper measure of damages to be applied. The Court then decided *Gaudet*, wherein the *Moragne* wrongful death remedy was expanded so as to include a claim for loss of consortium by a widow. Specifically, the Court permitted wrongful death recovery, notwithstanding that the decedent had recovered damages in a personal injury cause of action prior to his death. Although noting that most state and federal wrongful death statutes would not have permitted such a result, this Court felt that the judicially created *Moragne* wrongful death remedy should not be bound by statutory restrictions. While the *Moragne* Court deferentially examined Congressional enactments in first prescribing this judicially created wrongful death remedy, *Gaudet* sought to minimize the significance of such considerations on the grounds that the *Moragne* remedy had been judicially and not statutorily created. Dissimilarly, the *Gaudet* Court permitted recovery for loss of society, since the majority of the state statutes now permitted it.

In *Higginbotham*, the Court delineated the limitations of *Gaudet*, namely that it applied only within territorial waters. This latter decision signalled a retreat from the broad reading which had been ascribed to *Gaudet* by certain courts, and the Court itself noted that it had been possible to misinterpret *Gaudet* as having entirely replaced DOHSA.

The elimination of anomalies in the Federal Maritime Law, especially those hinging on geographical location of the tort in maritime personal injury or death cases, has long been a goal of this Court. *Moragne* had been designed to eliminate such an anomaly by creating a federal wrongful death statute so that recovery did not depend on the applicable provisions of the various state wrongful death statutes. However, *Gaudet,* in permitting loss of consortium damages, left such an anomaly when the Court in *Higginbotham,* faced with the applicability of DOHSA, could not ignore Congressional intent.

The situation facing the Court today does not require the creation of a further anomaly in the Federal Maritime Law between the rights of harbor workers and seamen. In *Higginbotham,* the Court was confronted with the clear applicability of a Congressional statute compelling that a distinction be made from its prior decision in *Gaudet.* Here, the Court is faced with a similar issue in conforming to the intent of Congress in the Jones Act's proscription against loss of consortium.

IV

It has long been a policy of this Court to uniformly treat injuries to similarly situated persons on vessels. In *Seas Shipping Co.* v. *Sieracki,* 328 U.S. 85 (1946), this Court permitted longshoremen to sue for unseaworthiness under the General Maritime Law reasoning that since seamen and longshoremen were engaged in a common pursuit for the shipowner, they should be afforded the same, but not greater, protection under the law.

In construing the Jones Act, this Court has placed reliance upon the inaction of Congress to change a result which had been previously determined by this Court. *Gillespie* v. *United States Steel Corp.,* 379 U.S. 148 (1964).

Similarly, the *Igneri* decision denying consortium recovery to the spouse of an injured longshoreman had been decided nearly ten years prior to the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act (hereinafter referred to in the Brief as "LHWCA"). This decision, uniformly accepted and applied throughout the country until the decision of this Court in *Gaudet,* had not been questioned at the time of such Amendments.

V

Uniformity has long been the goal of the Federal Maritime Law, and has its ultimate base in Article III, Section 2 of the United States Constitution. This Court has ruled that state statutes are not applicable where they would destroy "the very uniformity in respect to maritime matters which the Constitution was designed to establish." *Southern Pacific Co.* v. *Jensen,* 244 U.S. 205, 217 (1917).

Consideration of state law is not applicable to the issues presently before this Court. The availability or non-availability of a cause of action by a wife to recover for loss of consortium under New York Law or the law of any other state is wholly irrelevant. Similarly, the subsequent changes in the common law which now permit a wife's cause of action for loss of consortium are unrelated to this decision. Although *Igneri* looked to the common law, it based its decision on analogy to the preclusion of a cause of action for loss of consortium by the spouse of a seaman under the Jones Act.

Indeed, looking to state law for the rights of a spouse is inappropriate in questions of Federal Maritime Law. Maritime law denies consortium recovery to the spouse of an injured maritime worker irrespective of the sex of either party. The only discrimination which may result in such a

situation would be the creation of an anomalous result whereby the spouse of an injured longshoreman could recover for loss of consortium even though the spouse of an injured seaman could not under the Jones Act.

ARGUMENT

I.

Federal Maritime Law Had Overwhelmingly Denied Recovery for Loss of Consortium in Personal Injury Actions Prior to the Decision of This Court in *Gaudet*, a Wrongful Death Case.

A. Pre-*Gaudet* Maritime Personal Injury Cases Denied Recovery for Loss of Consortium Damages

In 1911, the Second Circuit in *Savage* v. *New York, Newfoundland & Halifax Steamship Co.*, 185 F. 778, 781 (2d Cir. 1911), held: "No instance of what is in substance an action per quod consortium amisit has been shown in admiralty." One year later, the Third Circuit disagreed with *Savage* in *New York & Long Branch Steamboat Co.* v. *Johnson*, 195 F. 740 (3d Cir. 1912) and permitted recovery for loss of "aid, comfort and society" to the spouse of an injured passenger. However, in that decision, the Third Circuit placed its reliance on inapposite cases, namely *Plummer* v. *Webb*, 19 F. Cas. 891 (C.C.D. Me. 1827) (No. 11,233), which permitted a father to sue in admiralty for the tortious abduction of his son, and *The Sea Gull*, 21 F. Cas. 909 (C.C.D. Md. 1865) (No. 12,578), which permitted a husband to recover for the death of his wife.

Following this early disagreement between the Second and Third Circuits, there were no reported decisions regarding loss of consortium in a maritime personal injury

action for more than forty years.[3] In *Westerberg* v. *Tide Water Associated Oil Co.*, 304 N.Y. 545, 110 N.E. 2d 395 (1953), the New York Court of Appeals, possibly due to the dubious reasoning utilized by the Third Circuit, experienced no difficulty in denying consortium recovery to the spouse of an injured seaman, noting that the maritime tort "cannot serve as a basis for plaintiff's complaint which demands relief of a character not within the purview of the . . . Jones Act." 304 N.Y. at 547. This decision was followed five years later by the Ninth Circuit in *Jordan* v. *States Marine Corp.*, 257 F.2d 232 (9th Cir. 1958). In 1959, the Southern District of New York in *Bergamaschi* v. *Isthmian Lines, Inc.*, [1959] A.M.C. 1862 (S.D.N.Y.), denied recovery for loss of consortium to the spouse of an injured longshoreman, and was followed three years later by the Eastern District of Michigan in *Pruitt* v. *M.S. Rigoletto*, 211 F. Supp. 295 (E.D. Mich. 1962). The next year marked the landmark decision of the Second Circuit Court of Appeals in *Igneri* v. *Cie. de Transports Oceaniques*, 323 F.2d 257 (2d Cir. 1963), *cert. denied*, 376 U.S. 949 (1964).

There, Theresa Igneri sought to recover damages for loss of "compensation, support, love, affection, and consortium," due to the injuries sustained by her longshoreman husband. After an exhaustive review of the authorities, Judge Friendly affirmed the district court's dismissal of the loss of consortium cause of action, and held that "the scheme of remedies, statutory and judicial, for injury to such maritime workers limits recovery to the person directly

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[3] In *Hitaffer* v. *Argonne Co.*, 183 F.2d 811 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950), recovery for loss of consortium was permitted under the LHWCA. However, the case appears to have had no maritime aspect, and the LHWCA was involved only due to its adoption as the Workman's Compensation Statute applicable in the District of Columbia. D.C. Code §§ 36-501, 36-502. *See Igneri* v. *Cie. de Transports Oceaniques*, 323 F.2d 257, 260, n. 4 (2d Cir. 1963), *cert. denied*, 376 U.S. 949 (1964).

injured." *Id.* at 268. The basis of the decision in *Igneri* was twofold: first, that the common law generally did not recognize a wife's cause of action for loss of consortium damage; and second, that the Jones Act precluded recovery for loss of consortium by either spouse. As to the common law, *Igneri* noted that maritime law often looks to the law prevailing on the land. The court found no support there on which to premise the wife's cause of action since the common law, as then interpreted, did not uniformly permit such a cause of action, but rather the majority of decisions had denied it. The court then considered the statutory maritime law, and based its decision on analogy to the Jones Act, not the common law. *See Westcott* v. *McAllister Brothers,* 463 F. Supp. 1039, 1041 (S.D.N.Y. 1978). As this Court noted in *Moragne* v. *States Marine Lines, Inc.,* 398 U.S. 375, 386-87 (1970):

> "Maritime law had always, in this country as in England, been a thing apart from the common law. It was, to a large extent, administered by different courts; it owed a much greater debt to the civil law; and, from its focus on a particular subject matter, it developed general principles unknown to the common law." (footnote omitted).

Instead of relying on the common law, Judge Friendly drew analogical support for his decision from the provisions of DOSHA and the Jones Act. After analyzing both Acts, Judge Friendly concluded that neither one permitted a nonpecuniary consortium recovery. More specifically related to the issue before the court was the Jones Act, and *Igneri* concluded that its failure to permit recovery for loss of consortium by the spouse of an injured seaman "cannot be dismissed as an inadvertence." 323 F.2d at 266.

The statutory language of the Jones Act precludes a claim for loss of consortium damages, since the cause of

action permitted thereunder limits it to "any seaman." The proscription cannot be any plainer. There is no legislative history to indicate that the cause of action was intended to be brought by anyone other than a seaman. As this Court long ago noted in *Caminetti* v. *United States,* 242 U.S. 470, 485 (1916):

> "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms." (citations omitted).

As the Jones Act clearly states, the right to bring the action is limited to "any seaman." By definition, an action for loss of consortium must be brought by the spouse of a seaman, as such a claim is derivative from the main cause of action. Therefore, the Jones Act, by its statutory provision, does not apply to such an action for loss of consortium. Recognizing this, the *Igneri* court stated:

> "When Congress, by the Jones Act, 46 U.S.C. § 688, gave a seaman the right to recover for personal injury caused by the employer's negligence, it did not authorize recovery by the seaman's wife for loss of consortium. As to non-fatal injuries this is plain from the language of the statute, which authorizes only the seaman himself (not his wife) to 'maintain an action for damages at law.' . . .
>
> It is true that, as a longshoreman, Peter Igneri, unlike a seaman, had a right to recover for personal injury for negligence of the vessel, based on non-statutory maritime law. . . . But that does not mean that in considering the novel question whether the spouse of a

longshoreman should be allowed to recover for loss of consortium, we should ignore the maritime law denying any such right to the spouse of a seaman. The failure of the Jones Act to confer such a right on the spouse of a seaman cannot be dismissed as an inadvertence. The policy of the Federal Employers' Liability Act, the regime which the Jones Act made applicable to seamen, was that the new remedy for the employee was to be exclusive and that claims of relatives recognized by state law were to be abrogated; the FELA had been thus authoritatively construed before the Jones Act was passed. . . ." *Id.* at 266 (citations omitted).

The Jones Act incorporates FELA by its provision that in Jones Act cases, "all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply." As Mr. Justice Black stated in *Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239, 244 (1942):

> "This Court has specifically held that the Jones Act is to have a uniform application throughout the country, unaffected by 'local views of common law rules.' . . . The Act is based upon, and incorporates by reference, the Federal Employers' Liability Act, which also requires uniform interpretation." (citations omitted).

FELA, therefore, established a comprehensive, national, uniform rule, providing the exclusive method of recovery for damages sustained as a result of injury to a railroad employee. See *New York Central & Hudson River Railroad* v. *Tonsellito*, 244 U.S. 360 (1917); *New York Central Railroad* v. *Winfield*, 244 U.S. 147 (1917); *Sarik* v. *Pennsylvania Railroad*, 68 F. Supp. 630 (W.D. Pa. 1946). Following the seminal decision of this Court in *Michigan Central Railroad*

v. *Vreeland*, 227 U.S. 59 (1913) limiting recovery under FELA to the pecuniary loss sustained (discussed in Point II (B), *infra*), the courts have uniformly denied recovery for loss of consortium to the spouse of an injured employee. As noted by the Ninth Circuit in *Jess* v. *Great Northern Railway*, 401 F.2d 535, 536 (9th Cir. 1968), in denying such recovery:

> "The Federal Employers' Liability Act not only provides the exclusive remedy for the recovery by an employee of damages sustained by him as the result of an injury to him, but also governs the recovery by others for damages resulting from such injury."

Other cases have similarly denied recovery of consortium damages in FELA personal injury cases. *See Anderson* v. *Burlington Northern, Inc.*, 469 F.2d 288 (10th Cir. 1972); *Greethurst* v. *Bethlehem Steel Corp.*, 380 F. Supp. 638 (N.D. Ind. 1974); *Louisville & Nashville Railroad* v. *Lunsford*, 216 Ga. 289, 116 S.E.2d 232 (1960); *Howes* v. *Baker*, 16 Ill. App. 3d 39, 305 N.E.2d 689 (1973); *Spinola* v. *New York Central Railroad*, 33 App. Div. 2d 74, 305 N.Y.S.2d 437 (1969); *Kinney* v. *Southern Pacific Co.*, 232 Or. 322, 375 P.2d 418 (1962); *cf. Sarik* v. *Pennsylvania Railroad*, 68 F. Supp. 630 (W.D. Pa. 1946) (not permitting husband to sue under FELA for the injuries sustained by his wife); *Prata* v. *National Railroad Passenger Corp.*, 70 App. Div. 2d 114, —— N.Y.S.2d —— (1979) (denying consortium recovery in FELA personal injury action subsequent to *Gaudet*).

Following the examination into the provisions of the Jones Act, and those of FELA which were incorporated therein, the *Igneri* court expanded on the policy reasons effectively precluding a consortium award to the wife of an injured longshoreman.

"Perceiving the anomaly in the rule which forbade a seaman, but not a harbor-worker, to recover for negligence against the ship, Congress largely ended the discrimination against seamen by passing the Jones Act; we should not create a new anomaly by giving the harbor-worker's wife a claim denied to the seaman's. . . . We can think of no reason why Congress, having ruled out a maritime claim against the ship for loss of consortium by the spouse of a negligently injured seaman, would wish the courts to construct one for the spouse of a negligently injured stevedore. . . ." *Id.* at 267-68.

The *Igneri* Court was concerned with promoting uniformity in the law of recovery for maritime personal injuries. It also attempted to avoid creating unnecessary anomalous distinctions between these similar workers in a maritime context. "The same considerations as to the desirability of uniformity that are relevant to the relations between a ship and those who work upon her apply with like force to claims by a worker's wife resulting from an injury to him." *Id.* at 259. Therefore, to avoid "capricious differences in treatment between similarly situated persons," the *Igneri* Court held that no such recovery was permitted the spouse of an injured longshoreman.

Following *Igneri,* the New York Supreme Court denied consortium recovery to the husband of an injured passenger in *Rogers* v. *City of New York,* 46 Misc. 2d 373, 259 N.Y.S.2d 604 (Sup. Ct. 1965), and the District of Maryland refused such recovery to the spouse of an injured longshoreman in *Sanseverino* v. *Alcoa Steamship Co.,* 276 F. Supp. 894 (D. Md. 1967). At this point, there was indeed uniformity in the Federal Maritime Law on the issue of recovery for loss of consortium in personal injury cases. That uniformity was destroyed by the decision of this Court in *Gaudet,* a

wrongful death case, which a number of courts have incorrectly interpreted as applying to all actions, whether they involve personal injury or death.

B. The Decision in *Gaudet*, a Wrongful Death Case, Has No Applicability to Maritime Personal Injury Actions

Following the decision of this Court in *Sea-Land Services, Inc.* v. *Gaudet,* 414 U.S. 573 (1974), a wrongful death case, the lower courts facing the issue of loss of consortium damages in maritime personal injury cases have been split as to whether such recovery is permitted. The uniformity which had existed prior to *Gaudet,* and which had denied such recovery, was now destroyed. Such a result was wholly unnecessary since *Gaudet,* a wrongful death case, has no applicability to maritime personal injury actions.

Nevertheless, some courts have erroneously interpreted *Gaudet* as overruling the *Igneri* rule denying recovery in maritime personal injury situations. The falsity of such an interpretation should be evident from an analysis of this Court's opinion in *Gaudet.* Specifically, this Court held:

"[U]nder the maritime *wrongful-death* remedy, the decedent's dependents may recover damages for their loss of support, services, and society, as well as funeral expenses." 414 U.S. at 584 (emphasis added).

No mention was made, nor inference created, that such a holding should be extended beyond the scope of a wrongful death situation. Indeed, rather than implicitly recognizing a cause of action for loss of consortium to the wife of an injured longshoreman, this Court in *Gaudet* all but explicitly rejected such a notion.

"Obviously, the decedent's recovery did not include damages for the dependents' loss of services or of society,

and funeral expenses. *Indeed, these losses—unique to the decedent's dependents—could not accrue until the decedent's death.*" *Id.* at 591-92 (emphasis added).

Just as *Moragne* left open to later cases specific recoveries to be permitted under the maritime wrongful death action, and created some uncertainty in lower courts throughout this country as to what elements could be recovered until the decision in *Gaudet*, so also did *Gaudet* lead to erroneous holdings as to what elements of damages could be recovered thereunder. (See discussion in Point II (C), *infra.*) Therefore, notwithstanding the limiting language of the Court, some lower state and federal courts have refused to follow the *Igneri* rule denying consortium recovery, concluding in a convoluted manner that *Gaudet*, a wrongful death case, had somehow affected the continued validity of *Igneri* in maritime personal injury actions. However, the policies considered and utilized by this Court in *Gaudet* have their bases in wrongful death cases and statutes, and their applicability should be limited thereto.

C. Although a Wrongful Death Case, *Gaudet* Unintentionally Destroyed the Doctrine of Uniformity Which Had Denied Loss of Consortium Damages in Maritime Personal Injury Actions

The first court to rule on this issue after the *Gaudet* decision, the Florida Appellate Court, cited *Igneri* and held that no recovery was permitted to the spouse of an injured longshoreman. *Davidson* v. *Schlussel Reederi KG*, 295 So. 2d 700 (Fla. App. 1974). However, in *Pesce* v. *Summa Corp.*, 54 Cal. App. 3d 86, 126 Cal. Rptr. 451 (1975) a California intermediate court permitted a wife's action for loss of consortium due to injuries received by her longshoreman husband, concluding that *Igneri* had been overruled by *Gaudet* and *Skidmore* v. *Grueninger*, 506 F.2d 716

(5th Cir. 1975), even though both of those cases were wrongful death actions.

In *Conley* v. *United Overseas Export Lines, Ltd.*, Civ. No. H-76-590 (D. Md., Sept. 28, 1976), Judge Harvey of the District of Maryland granted a motion to dismiss a claim for loss of consortium to the spouse of an injured longshoreman. However, in *Lemon* v. *Bank Lines, Ltd.*, 411 F. Supp. 677 (S.D. Ga. 1976), *rev'd on reconsideration*, No. CV 476-33 (S.D. Ga., March 14, 1977), *reversal aff'd without opinion*, 562 F.2d 1259 (5th Cir. 1977), Judge Lawrence of the Southern District of Georgia aligned himself with the *Pesce* Court, and denied the defendant's motion to dismiss a cause of action for loss of consortium in a maritime personal injury case. The rationale used by the district court in *Lemon* fails for the same reason as it does in *Pesce.* Indeed, such a failure was later recognized by Judge Lawrence when he reversed his decision and dismissed the complaint on the authority of *Christofferson* v. *Halliburton Co.*, 534 F.2d 1147 (5th Cir.), *rehearing en banc denied*, 542 F.2d 1174 (5th Cir. 1976). The *Christofferson* court denied recovery for loss of consortium to the spouse of an injured seaman. That court correctly noted that *Gaudet* applied only to wrongful death situations, and did not imply that recovery would be permitted for loss of consortium arising out of an injury to a maritime worker:

> "Restricting loss of society to that arising after the death of an injured maritime worker indicates no intention to create an action for loss of consortium under the general maritime law where the husband was not fatally injured." *Id.* at 1150-51.

The court upheld the continuing validity of *Igneri*, since *Gaudet had* "implicitly limited a claim for loss of society to a maritime wrongful death action . . ." *Id.* at 1150.

Additionally, the Fifth Circuit relied on the statutory prohibition in the Jones Act against anything but direct recovery by the injured seaman himself in a negligence suit, and on the principle that such a right was also non-existent under the General Maritime Law.

> "When Congress, in 1915, gave a seaman the right to recover for personal injury caused by his employer's negligence under the Jones Act, it did not authorize recovery by the seaman's wife for loss of consortium but restricted the cause of action to 'any seaman.'" *Id.* at 1149.

Therefore, the *Christofferson* court held that the consortium cause of action had been properly dismissed by the district court for two reasons: first, that under the Jones Act, a seaman and not his wife may recover damages; and second, that courts have held that the wife of an injured employee cannot recover for loss of consortium under FELA. (See discussion in Point I (A), *supra.*)

That same year also demonstrated the first clear example of the internal anomalies created by the lower courts' attempt to discern the true meaning of this Court's decision in *Gaudet.* In *Consolidated Machines, Inc.* v. *Protein Products Corp.,* 428 F. Supp. 209 (M.D. Fla. 1976), a limitation of liability petition was filed in response to personal injury and death claims by and on behalf of persons who had been exposed to hydrogen sulphide gas. In listing the elements of damages to be awarded under the General Maritime Law, the court permitted recovery for loss of society on behalf of those who died, while denying it to the spouses of those who were injured. *Id.* at 228.

The following year, in *Giglio* v. *Farrell Lines, Inc.,* 424 F. Supp. 927 (S.D.N.Y. 1977), *appeal denied,* No. 77-

8014 (2d Cir., Feb. 17, 1977), Judge Lasker in the Southern District of New York denied the defendant's motion to dismiss a cause of action for loss of consortium in a maritime personal injury case. The court noted that the common law had changed since *Igneri* had been decided, and that *Gaudet* had permitted loss of society in a wrongful death case. This led the court to conclude "that compensation for such loss may well be an idea whose time has come." *Id.* at 930. Acknowledging that his conclusions ignored *Igneri's* teachings, Judge Lasker certified the question for appeal to the Second Circuit, but in an unreported opinion, the Second Circuit denied defendant's petition for leave to appeal, and Giglio's action has since been dismissed on the merits, although an appeal is pending. No. 79-7078 (2d Cir., 1979).

Similarly, citing *Giglio* and *Gaudet,* the District Court for the Virgin Islands in *Hubschman* v. *Antilles Airboats, Inc.,* 440 F. Supp. 828 (D.V.I., 1977), permitted the wife of an injured seaplane pilot to recover for loss of consortium. However, that same year, the District Court of Maryland refused such recovery to the wife of an injured longshoreman in *Wetters* v. *Moore-McCormack Lines,* [1977] A.M.C. 1529 (D. Md.), stating:

> "In actions for wrongful death, damages for loss of consortium can be awarded under the general maritime law to the spouse of any maritime death victim, whether longshoreman or seaman. Therefore, in permitting damages for loss of consortium in wrongful death cases, the Supreme Court in *Gaudet* did not create any distinction between a longshoreman and a seaman.
>
> In effect, this Court must choose between two distinctions. In following *Lemon* and *Pesce,* this court would permit the spouse of an injured longshoreman

to recover when the spouse of an injured seaman could not. In following *Igneri,* the court perpetuates a distinction between recovery if a longshoreman is injured and recovery if he is killed. If a longshoreman is injured, his spouse cannot recover for loss of consortium. However, if he is killed, his spouse may so recover.

As Congress in the Jones Act did not extend the recovery to the spouse of an injured seaman, this court will continue to limit the recovery of the spouse of an injured longshoreman and will not permit that spouse to recover damages for loss of consortium. It appears to the court to be more equitable to follow *Igneri* than to permit the spouse of a longshoreman to recover for loss of consortium when the longshoreman is injured or killed when the spouse of a seaman can recover only when the seaman is killed." *Id.* at 1537-38.

The next year, Chief Judge Northrop of the District of Maryland granted a motion to dismiss a claim for loss of consortium by the spouse of an injured longshoreman in *Merriman* v. *Atlantic & Gulf Stevedores, Inc.,* Civ. No. N-76-1659 (D. Md., Aug. 31, 1978). Similarly, Judge Sand of the Southern District of New York denied loss of consortium recovery to the spouse of an injured seaman in *Westcott* v. *McAllister Brothers,* 463 F. Supp. 1039 (S.D. N.Y. 1978), answering in the negative "the question, whether in the face of a statute which limits recovery to the seaman himself, this court may fashion a remedy for the seaman's wife." *Id.* at 1042. In analyzing the effect of this Court's decisions in *Higginbotham* and *Gaudet,* respectively, the court held:

> "Bearing in mind the Court's admonition with respect to the creation of 'supplementary' remedies in the context of the statutory remedy of DOHSA, we must inquire as to whether there is any reason for a different rule where the action is brought by the wife of an injured seaman under the Jones Act, rather than a widow under DOHSA. We fail to see a basis for a different result. . . .
>
> We conclude that, while it is 'the humanitarian policy of the maritime law to show "special solicitude" for those who are injured within its jurisdiction'. . . , this Court is precluded by the established construction of the Jones Act from upholding the cause of action claimed by Mrs. Westcott." *Id.* at 1042-43.

The same year, the New York Court of Appeals below decided *Alvez* v. *American Export Lines, Inc.,* 46 N.Y.2d 634, 389 N.E.2d 461, 415 N.Y.S.2d 979 (1979). Concluding that the common law has now changed, and generally permits a wife to recover for loss of consortium the court stated:

> "In our opinion, examination of the *ratio decedendi* of the *Igneri* decision reveals an erosion of its theoretical underpinnings so severe as to precipitate its collapse under its own weight." 46 N.Y.2d at 639, App. D, at A12.

Similarly in *Doca* v. *Marina Mercante Nicaraguense, S.A.,* 474 F. Supp. 751 (S.D.N.Y. 1979), Judge Duffy of the Southern District of New York permitted the spouse of an injured longshoreman to recover for loss of consortium, noting the changes which had occurred since *Igneri* had been decided in 1963. However, in *Manolakis* v. *Indo Pacific Carriers, Inc.,* No. 78 Civ. 1075 (S.D.N.Y., June 27, 1979), Judge Sand, of the same court, granted a motion to dismiss a cause of action for loss of consortium to the

spouse of an injured seaman. Judge McGovern of the Western District of Washington permitted a jury verdict which included loss of consortium damages to the spouse of an injured longshoreman, which decision was affirmed by the Ninth Circuit without mentioning the consortium issue, in *Bachtel* v. *Mammoth Bulk Carriers, Ltd.*, 605 F.2d 438 (9th Cir. 1979).

Judge Tauro, of the District of Massachusetts, in *Short* v. *Exxon Co.* [1978] A.M.C. 1762, 1764 (D. Mass. 1977) questioned, without deciding, whether the wife of an injured harbor-worker has a cause of action for loss of consortium.

It is significant to note that only two federal appellate courts have squarely faced the issue of loss of consortium recovery by the spouse of an injured maritime worker. In its landmark *Igneri* decision, eleven years prior to *Gaudet,* the Second Circuit refused to permit such recovery to the spouse of an injured longshoreman. In *Christofferson,* decided two years after *Gaudet,* the Fifth Circuit found continued vitality in *Igneri,* and denied such recovery to the spouse of an injured seaman. Despite this, some lower federal and state courts have split as to the availability of such a cause of action, since *Gaudet.* As delineated in Point I (B), *supra,* although *Gaudet* has no applicability to a maritime personal injury action, its preachments have tended to foster nonuniformity in this area of Federal Maritime Law.

As predicted by this Court in *Moragne*: "In most respects the law applied in personal injury cases will answer all questions that arise in death cases." 398 U.S at 406. As is evident from the morass of lower court opinions generated by *Moragne* and its progeny, this prediction has been inverted, in that some lower courts felt themselves bound to

apply, in personal injury cases, the rules fashioned by this Court in wrongful death situations. It is indeed true, as noted in the *Gaudet* dissent, that the decision therein "will create difficulty and confusion in litigation of admiralty cases." 414 U.S. at 597 (Powell, J., dissenting). The uniformity which existed in maritime personal injury cases, prior to the wrongful death decision in *Gaudet,* should be reinstituted by this Court.

II.

Except for the Limited Geographical Boundaries of *Gaudet,* Federal Maritime Law Precludes Recovery for Nonpecuniary Damages in Death Actions.

A. Nonpecuniary Damages Are Proscribed by the Jones Act

In describing recovery under the Jones Act, Mr. Justice Cardozo, in *Warner* v. *Goltra,* 293 U.S. 155, 156 (1934) stated:

> "It gives to 'any seaman' injured in the course of his employment, and in case of the death of such seaman to his personal representatives, a cause of action similar to that given by the statutes of the United States to railway employees."

Similarly, it was held in *Moragne* v. *States Marine Lines, Inc.,* 398 U.S. 375, 407 (1970) that "the beneficiary provisions of the Jones Act are applicable only to a specific class of actions—claims by seamen against their employers. . ."

Prior to the decision in *Sea-Land Services, Inc.* v. *Gaudet,* 414 U.S. 573 (1974), it had long been held that recovery under the Jones Act could only be had for the pecuniary loss suffered by the seaman or his designated

beneficiaries. *See United States* v. *Boykin,* 49 F.2d 762 (5th Cir. 1931); *Savard* v. *Marine Contracting, Inc.,* 296 F. Supp. 1171 (D. Conn. 1969); *In re Risdal & Anderson, Inc.,* 291 F. Supp. 353 (D. Mass. 1968); *Tate* v. *C.G. Willis, Inc.,* 154 F. Supp. 402 (E.D. Va. 1957); *In re Southern Steamship Co.,* 135 F. Supp. 358 (D. Del. 1955); *Gerardo* v. *United States,* 101 F. Supp. 383 (N.D. Cal. 1951); *American Barge Line Co.* v. *Leatherman's Adm'x,* 306 Ky. 284, 206 S.W.2d 955 (1947). As the court in *American Barge, supra* at 957-58, stated:

> "Thus, the law seems to have been established in a case of this character that pecuniary loss or the reasonable expectation of such a loss is the only element of damage that may be considered in awarding a verdict. While loss of companionship, grief, mental distress are all very great and very real elements of human suffering for which no adequate measure of compensation ever exists in cases of this kind, yet the Federal Employers' Liability Act does not facilitate a requital for such evils, since the Act is solely one for dollar replacement, either for a momentary deprivation of the present or for one of reasonable anticipation of the future."

Even following the decision in *Sea-Land Services, Inc.* v. *Gaudet,* 414 U.S. 573 (1974), it has been held that the Jones Act only permits recovery for pecuniary damages. *See Ivy* v. *Security Barge Lines, Inc.,* 585 F.2d 732 (5th Cir. 1978), *rehearing en banc,* No. 76-4130 (5th Cir., Nov. 13, 1979); *Standard Products, Inc.* v. *Patterson,* 317 So. 2d 376 (Miss. 1975). Indeed, as noted by *Ivy,* this Court in *Higginbotham* has also implicitly affirmed such an interpretation of the Jones Act in a wrongful death case. Although the decision did not specifically discuss the Jones Act, the existence of a Jones Act seaman "was raised squarely by

the facts, and urged on application for rehearing." *Ivy,* slip op. at 1061.

> "By deciding that pecuniary damages could not be recovered by any of the plaintiffs, including the representative of Shinn [a Jones Act seaman], the Supreme Court decided sub silentio that a Jones Act seaman's beneficiaries can not recover nonpecuniary damages for a death occurring on the high seas. Were nonpecuniary damages available under the Jones Act, although not under DOHSA, the Supreme Court would have affirmed as to Shinn while reversing as to the other plaintiffs." 585 F.2d at 738.

While the Jones Act contains no specific exclusion of nonpecuniary damages, it does incorporate the provisions of FELA, which has been authoritatively interpreted to so confine an award (as is discussed in Point II (B), *infra*).

> "To allow the recovery of nonpecuniary damages under the Jones Act merely because the accident occurred within territorial waters would not only be inconsistent with this policy and negate years of firmly established legal precedent, but would create two separate Jones Act remedies, each applicable only within its own geographical sphere. It would be anomalous indeed if we interpreted the Supreme Court's opinion to encourage the creation of needless disuniformity based solely on the place of the accident, bringing the law full circle from the days prior to *Moragne.*" *Id.*

Finally, in its rehearing en banc, the Fifth Circuit in *Ivy* delineated and rejected certain policy considerations touching on a "humanitarian" appeal for permitting such nonpecuniary damages.

> "There is superficial appeal in the argument that to award damages for loss of support would be humani-

tarian, and the correlative implication that to deny it is callous. The same emotive semantics would characterize as parsimonious and unfeeling any denial of any sort of nonpecuniary damage; awards for grief and anguish, for loss of consortium, for loss of affection or for any other sort of emotional distress could be justified by the same appeal that sentiment should disregard history and jurisprudence.

The Jones Act not only implicitly limits the kind of damages that may be recompensed; by incorporating remedies available under the F.E.L.A., it expressly permits only certain persons to receive even redress for pecuniary losses. A dependent, widowed mother may receive nothing for the death of her sole support if her son was married; a dependent, enfeebled aunt, who was actually being supported by her nephew, may recover nothing if her compassionate relative also had a parent, even a wealthy and completely self-supporting one. *See* 45 U.S.C. § 51. If sheer compassion alone dictates a change in the scope of the Jones Act with respect to items of damage, after more than six decades of consistent interpretation, or with respect to beneficiaries, for whom an even more compelling appeal can be made, the argument for change must be addressed to Congress, as the author of the Jones Act, for it is only under the authority of that statute that the plaintiff has a right to be in court." *Ivy,* slip op. at 1062, n.13.

B. Nonpecuniary Damages Are Proscribed by FELA

As previously noted in Point I (A), *supra,* FELA established a uniform rule, providing the exclusive method of recovery for damages sustained as the result of an injury to a covered employee. The same rule and policies underlying FELA also apply in wrongful death actions. *See Erie Railroad* v. *Winfield,* 244 U.S. 170 (1917); *Michigan Central Railroad* v. *Vreeland,* 227 U.S. 59 (1913).

In its seminal opinion on the proper interpretation of FELA, this Court decided more than sixty years ago in *Michigan Central, supra,* that the statute does not permit the recovery of nonpecuniary damages. That case involved an action brought by the widow of a railroad employee, for the loss suffered by her as a result of his wrongful death. This Court noted that two distinct causes of action existed, one for the injuries suffered by the decedent, and a second independent cause of action for the beneficiaries, for their losses as a result of the decedent's death.

In determining the damages which could be awarded under FELA, the Court could not simply conclude from the statutory language that only pecuniary losses could be recovered, since the word "pecuniary" does not occur in FELA. Indeed, the Court was not at all unaware of the very real nature of certain losses which would be characterized as nonpecuniary, and provided the following distinction between a pecuniary and a nonpecuniary loss.

> "A pecuniary loss or damage must be one which can be measured by some standard. It is a term employed judicially, 'not only to express the character of the loss of the beneficial plaintiff which is the foundation of the recovery, but also to discriminate between a material loss which is susceptible of pecuniary valuation, and that inestimable loss of the society and companionship of the deceased relative upon which, in the nature of things, it is not possible to set a pecuniary valuation.'" *Id.* at 71, *citing* Patterson, *Railway Accident Law,* §401.

For an analogy, the Court turned to Lord Campbell's Act, "the first act which ever provided for a cause of action

arising out of the death of a human being," and which had been adopted and modified in many of the state wrongful death actions. *Id.* at 69. Indeed, FELA was characterized by the Court as essentially a Lord Campbell's Act. *Id.* at 62. *See also Sea-Land Services, Inc.* v. *Gaudet,* 414 U.S. 573, 582 (1974); *Van Beeck* v. *Sabine Towing Co.,* 300 U.S. 342, 346 (1937) (as is the Jones Act); *Mellon* v. *Goodyear,* 277 U.S. 335, 345 (1928); *Martin* v. *Atlantic Coast Line Railroad,* 268 F.2d 397, 398 (5th Cir. 1959); *McCoullough* v. *Chicago, Rock Island & Pacific Railway,* 160 Iowa 524, 142 N.W. 67, 70-71 (1913).

Although Lord Campbell's Act also did not contain the word "pecuniary," this Court noted that such statute "and all those which follow it have been continuously interpreted as providing only for compensation for pecuniary loss or damage". 227 U.S. at 71. Therefore, in interpreting FELA, this Court ruled that only pecuniary losses may be compensated thereunder. This ruling has subsequently been reaffirmed by this Court. For example, in *Garrett* v. *Louisville & Nashville Railroad,* 235 U.S. 308, 312 (1914), it was held that a FELA wrongful death action on behalf of the stated beneficiaries "extends only to the *pecuniary* loss and damage resulting to them by reason of the death." (emphasis in original).

This ruling, limiting recovery under FELA to pecuniary loss, has been uniformly adhered to since the original decision in *Michigan Central, supra. See Mellon* v. *Goodyear,* 277 U.S. 335, 346 (1928); *Louisville & Nashville Railroad* v. *Holloway,* 246 U.S. 525, 527 (1918); *Chesapeake & Ohio Railway* v. *Kelly,* 241 U.S. 485, 489 (1916); *Garrett* v. *Louisville & Nashville Railroad, supra; North Carolina Railroad* v. *Zachary,* 232 U.S. 248, 256-57 (1914); *Gulf, Colorado & Santa Fe Railway* v. *McGinnis,* 228 U.S. 173, 175 (1913); *American Railroad* v. *Didrickson,* 227 U.S. 145, 150-51

(1913); *Martin* v. *Atlantic Coast Line Railroad,* 268 F.2d 397, 400 (5th Cir. 1959); *Stark* v. *Chicago, North Shore & Milwaukee Railway,* 203 F.2d 786, 788 (7th Cir. 1953); *Rodzik* v. *New York Central Railroad,* 169 F. Supp. 803, 806 (E.D. Mich. 1959); *Mobile & Ohio Railroad* v. *Williams,* 226 Ala. 541, 147 So. 819, 823, *cert. denied,* 290 U.S. 655 (1933); *McCoullough* v. *Chicago, Rock Island & Pacific Railway,* 160 Iowa 524, 142 N.W. 67, 70-71 (1913); *Simmons* v. *Louisiana Railway & Navigation Co.,* 153 La. 405, 96 So. 12 (1923); *Shaw* v. *Texas & Pacific Railway,* 170 So. 2d 874, 879 (La. App. 1965), *appeal denied,* 247 La. 621, 172 So. 2d 703 (1965); *Barnes* v. *Red River & Gulf Railroad,* 14 La. App. 188, 128 So. 724, 729 (1930); *Torchia* v. *Burlington Northern, Inc.,* 568 P.2d 558, 565 (Mo. 1977), *cert. denied,* 434 U.S. 1035 (1978); *St. Louis-San Francisco Railway* v. *Floyd,* 146 Okla. 42, 293 P. 250, 253-54 (1930); *Devine* v. *Southern Pacific Co.,* 207 Or. 261, 295 P.2d 201, 208 (1956); *Nashville, Chattanooga & St. Louis Railway* v. *Anderson,* 134 Tenn. 666, 185 S.W. 677, 681 (1916); *St. Louis, San Francisco & Texas Railway* v. *Geer,* 149 S.W. 1178, 1181 (Tex. Civ. App. 1912), *aff'd,* 109 Tex. 36, 194 S.W. 939 (1917); *see also Bolino* v. *Illinois Terminal Railroad,* 355 Mo. 1236, 200 S.W.2d 352, 357 (1947).

C. Nonpecuniary Damages Are Proscribed by DOHSA

Neither *Moragne,* which created a wrongful death cause of action under the General Maritime Law, nor *Gaudet,* which expanded the death remedy to include a claim for loss of consortium by a widow, involved DOHSA, since both involved accidents occurring within territorial waters. However, such an issue was faced by this Court in *Mobil Oil Corp.* v. *Higginbotham,* 436 U.S. 618 (1978). There, this Court only had to look to the statutory language of DOHSA.

> "The recovery in such suit shall be a fair and just compensation for the *pecuniary loss* sustained by the

persons for whose benefit the suit is brought . . ." 46 U.S.C. §762 (emphasis added).

Since its provisions clearly limit the recovery permitted under DOHSA to "pecuniary loss," *Higginbotham* denied loss of consortium damages to the decedent's survivors. Indeed, no real determination had to be made:

> "Congress has struck the balance for us. It has limited survivors to recovery of their pecuniary losses." 436 U.S. at 623.

Therefore, due to the clear applicability of DOHSA to deaths occurring beyond the territorial waters, recovery in such actions would be limited to "pecuniary loss." However, if the death occurs within the territorial waters, damages for nonpecuniary loss, such as loss of consortium, may be recovered. *See id.* at 626 (Marshall, J., dissenting). Due to the statutory provisions of DOHSA, the anomalous result was compelled after the decision in *Gaudet.*

Even prior to the decision of this Court in *Higginbotham,* DOHSA had uniformly been interpreted as limiting recovery solely to the pecuniary loss sustained. DOHSA and FELA have both been considered to be essentially Lord Campbell Acts (*Solomon* v. *Warren,* 540 F.2d 777, 788, n.12 (5th Cir. 1976), *cert. dismissed,* 434 U.S. 801 (1977); *National Airlines, Inc.* v. *Stiles,* 268 F.2d 400, 404, n.4 (5th Cir.), *cert. denied,* 361 U.S. 885 (1959)), and to have the same measure of recovery. *Solomon, supra; National Airlines, supra; Middleton* v. *Luckenbach Steamship Co.,* 70 F.2d 326, 330 (2d Cir.), *cert. denied,* 293 U.S. 577 (1934); *The City of Rome,* 48 F.2d 333, 337 (S.D.N.Y. 1930). Therefore, recovery under DOHSA has been held to be limited to pecuniary loss, (*Solomon, supra; First National Bank* v. *National Airlines, Inc.,* 288 F.2d 621 (2d Cir.), *cert. denied,* 368 U.S. 859 (1961); *Middleton, supra; In re Risdal & Anderson, Inc.,* 291 F. Supp. 353 (D. Mass. 1968); *Gerardo* v. *United States,* 101 F. Supp. 383 (N.D. Cal. 1951); *The City of Rome, supra*) and recovery for loss of society or consortium has not been permitted. *Middleton, supra; Chute* v. *United States,* 466 F. Supp. 61 (D. Mass. 1978); *Thompson* v. *Offshore Co.,* 440 F. Supp. 752 (S.D. Tex. 1977) (although permitted under the General Maritime Law); *Gerardo, supra.*

Indeed, the only court which appears to have held that nonpecuniary losses could be recovered under DOHSA in spite of its statutory language, was the Fifth Circuit in *Law* v. *Sea Drilling Corp.,* 510 F.2d 242 (5th Cir.), *rehearing en banc denied,* 523 F.2d 793 (5th Cir. 1975). The court concluded that *Gaudet* had entirely replaced DOHSA, and therefore permitted such recovery. As this Court itself noted in *Higginbotham,* such an interpretation of *Gaudet* was possible, although incorrect. 436 U.S. at 623. (*See also* Gilmore & Black, *The Law of Admiralty,* §6-33, pp. 369-70 (2d ed. 1975), wherein the authors arrived at the same erroneous conclusion.) However, the *Higginbotham* Court clearly rejected such an interpretation of DOHSA, since Congress had already determined that nonpecuniary recovery was precluded by DOHSA. *Id.*

D. Nonpecuniary Wrongful Death Damages Have Only Been Permitted in Post-*Gaudet,* Non-Jones Act, Non-FELA, and Non-DOHSA Cases

The only area of maritime death cases wherein nonpecuniary damages, such as loss of consortium, have been permitted, are non-Jones Act, non-FELA, and non-DOHSA cases, decided after *Gaudet.* Recovery for loss of consortium damages had been uniformly denied prior to *Gau-*

det. See In re Canal Barge, 480 F.2d 11 (5th Cir. 1973), *on rehearing,* 513 F.2d 911 (5th Cir.), *cert. denied,* 423 U.S. 840 (1975) (General Maritime Law); *Simpson* v. *Knutsen,* 444 F.2d 523 (9th Cir. 1971) (Longshoreman); *In re United States Steel Corp.,* 436 F.2d 1256 (6th Cir. 1970), *cert. denied,* 402 U.S. 987 (1971) (General Maritime Law); *Nye* v. *A/S D/S Svendborg,* 358 F. Supp. 145 (S.D.N.Y. 1973), *modified on other grounds,* 501 F.2d 376 (2d Cir. 1974), *cert. denied,* 420 U.S. 964 (1975) (General Maritime Law); *Green* v. *Ross,* 338 F. Supp. 365 (S.D. Fla. 1972), *aff'd,* 418 F.2d 102 (5th Cir.), *cert. denied,* 414 U.S. 1068 (1973) (General Maritime Law); *Curry* v. *United States,* 338 F. Supp. 1219 (N.D. Cal. 1971) (Seaman suing under Suits in Admiralty Act and Public Vessels Act); *Smith* v. *Olsen & Ugelstad,* 324 F. Supp. 578 (E.D. Mich. 1971) (Longshoreman); *Valitutto* v. *D/S I/D Garonne,* 295 F. Supp. 764 (S.D.N.Y. 1969) (General Maritime Law), *cf. Strickland* v. *Nutt,* 264 So. 2d 317 (La. App.), *aff'd sub nom.,* De Rouen v. Nutt, 262 La. 1124, 266 So. 2d 432 (1972) (General Maritime Law, Jones Act, and DOHSA).

Following *Gaudet,* numerous courts have permitted loss of consortium damages in non-DOHSA maritime death actions, as mandated by *Gaudet. See Morvant* v. *Construction Aggregates Corp.,* 570 F.2d 626 (6th Cir.), *cert. dismissed,* 99 S. Ct. 44 (1978) (General Maritime Law); *Landry* v. *Two R. Drilling Co.,* 511 F.2d 138 (5th Cir.), *rehearing en banc denied,* 517 F.2d 675 (5th Cir. 1975) (General Maritime Law); *Skidmore* v. *Grueninger,* 506 F.2d 716 (5th Cir. 1975) (General Maritime Law); *McDonald* v. *Federal Barge Lines, Inc.,* 496 F.2d 1376 (5th Cir. 1974) (General Maritime Law); *In re Canal Barge,* 513 F.2d 911 (5th Cir.), *cert. denied,* 423 U.S. 840 (1975) (General Maritime Law); *Moll* v. *Southern Charters, Inc.,*

81 F.R.D. 77 (E.D.N.Y. 1979) (General Maritime Law); *Fitzgerald* v. *Angela Compania Naviera, S.A.,* No. 74 Civ. 1293 (S.D.N.Y., Feb. 23, 1978) (General Maritime Law); *Thompson* v. *Offshore Co.,* 440 F. Supp. 752 (S.D. Tex. 1977) (General Maritime Law); *Consolidated Machines, Inc.* v. *Protein Products Corp.,* 428 F. Supp. 209 (M.D. Fla. 1976) (General Maritime Law, but not permitting if injured); *Hebert* v. *Otto Candies, Inc.,* 402 F. Supp. 403 (E.D. La. 1975) (General Maritime Law); *Carrillo* v. *Samaeit Westbulk,* 385 F. Supp. 119 (D.P.R. 1974), *modified on other grounds,* 514 F.2d 1214 (1st Cir. 1975) (Longshoreman); *In re Farrell Lines, Inc.,* 378 F. Supp. 1354 (S.D. Ga. 1974), *rev'd on other grounds,* 530 F.2d 7 (5th Cir. 1976) (General Maritime Law); *cf. McMillan* v. *Marine Sulphur Shipping Corp.,* No. 79-7054, at n. 1 (2d Cir., Oct. 9, 1979) (reversing on other grounds consortium award to widow of longshoreman, and questioning its maintainability).

However, it is significant to note that the courts in *Morvant, Landry,* and *Thompson, supra,* clearly stated that although such recovery was now permitted under the General Maritime Law, it still was not permitted under the Jones Act. *Cf., Higginbotham,* as explained by *Ivy,* 585 F.2d at 738, and discussed in Point II (A), *supra.* Finally in its rehearing en banc, the Fifth Circuit in *Ivy* noted that neither *Moragne* nor *Gaudet* involved Jones Act seamen, only claims for unseaworthiness under the General Maritime Law. The en banc court held that it could not supplement the damages provided in the Jones Act with the damages available under *Moragne* and *Gaudet.*

> "To consider the *Moragne-Gaudet* result a supplemental remedy to the Jones Act when the suit is for negligence only is not to supplement the statute but

to alter the interpretation it has continuously received." *Ivy*, slip op. at 1060.

The policies of uniform recovery underlying the creation of the *Moragne* wrongful death remedy have been undermined by *Gaudet*. That decision permitted nonpecuniary recovery under the General Maritime Law if the injury causing death occurred within territorial waters, when such damages are precluded in death actions under the Jones Act, FELA, and DOHSA.

III.

Even In Its Sphere of Wrongful Death Damages, *Gaudet* Has Revived the Nonuniformity In Federal Maritime Law Which *Moragne* Had Sought to Eliminate.

Moragne v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970) created a wrongful death cause of action under the General Maritime Law. *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573 (1973) expanded the *Moragne* wrongful death remedy so as to include a claim for loss of consortium by a widow. *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618 (1978) refined *Gaudet*, explained its limitations, and signalled a retreat from the broad reading certain courts had ascribed to that decision, by holding that consortium damages could not be recovered when DOHSA is applicable. Although the policy of uniformity in Federal Maritime Law was expressed in each of these decisions, it is respectfully submitted that *Gaudet* disregarded "the source of law endorsed by *Moragne*, as well as the concern for uniformity expressed in that opinion." 414 U.S. at 596 (Powell, J., dissenting).

In *Moragne*, the Court was careful to note that there was no Congressional policy against permitting recovery for wrongful death, citing DOHSA and the Jones Act. Indeed,

the Court noted "a policy favoring recovery in the absence of a legislative direction to except a particular class of cases." 398 U.S. at 393. The Court paid special deference to Congressional enactments in similar areas in determining the policy which must be applied in fashioning rights and remedies, and was encouraged "that Congress has given no affirmative indication of an intent to preclude the judicial allowance of a remedy for wrongful death to persons in the situation of this petitioner." *Id.* The Court rejected the argument that overruling *The Harrisburg*, 119 U.S. 199 (1886), would require explanation by future decisions to define a new cause of action. Instead of creating a new body of Federal Maritime Law, the *Moragne* court stated that its decision only removed the preclusion under the existing General Maritime Law. *Id.* at 405-06.

In *Gaudet*, the question as fashioned by this Court, was "whether the widow of a longshoreman may maintain such an action for the wrongful death of her husband—alleged to have resulted from injuries suffered by him while aboard a vessel in navigable waters—after the decedent recovered damages in his lifetime for his injuries." 414 U.S. at 574. The Court rejected any *res judicata* bar to such an action, holding that *Moragne* had created a true wrongful death remedy separate and independent from any action which the decedent may have had during his lifetime for his injuries. *Id.* at 578. Noting that the majority of state and federal wrongful death statutes, including FELA, had been held to bar a cause of action for wrongful death by the decedent's recovery during his lifetime, *Gaudet* stated that such a result derived from a statutory remedy, and therefore restrictions could validly be imposed on the right to recover. *Id.* at 579. However, since *Moragne* was not a statutory remedy, but had been created by this Court, *Gaudet*, citing *The Sea Gull*, 21 F. Cas. 909 (C.C.D. Md.

1865) (No. 12,578) and the "humane and liberal character" of admiralty to compensate dependents for their losses, held that there was not any "statutory language or 'established and inflexible rules' of maritime law [to] require a contrary conclusion." *Id.* at 583.

It is this reasoning that is perplexing. Although the *Moragne* Court noted that due deference be given to similar Congressional enactments in first pronouncing the admittedly judicially created maritime wrongful death remedy, *Gaudet* denied, or at least sought to avoid, the relevance of such considerations for the very reason that the *Moragne* remedy had been judicially and not statutorily created. Additionally, as noted by the dissent, the direction in *Moragne* to comport with state courts and state wrongful death statutes, was ignored by *Gaudet,* since the majority of such statutes hold that recovery in a personal injury action precludes a subsequent wrongful death action, as does the Restatement of Torts. *Id.* at 602-603. (Powell, J., dissenting).

Gaudet then defined loss of society to include "love, affection, care, attention, companionship, comfort, and protection," although it specifically excluded mental anguish or grief. 414 U.S. at 585. (The practical problems with this definition were amply stated in *Higginbotham,* 436 U.S. at 623, n.17.) Although the *Gaudet* Court noted that the early wrongful death statutes had been interpreted to preclude such nonpecuniary recovery, and that DOHSA explicitly proscribes it, it stated that the majority of states now permit recovery for loss of society either by statutory or judicial decision. Therefore, *Gaudet* concluded that permitting recovery for loss of society merely brought the maritime wrongful death remedy into accord with the majority of state wrongful death remedies. *Id.* at 586-88. Contrary to distinguishing *Moragne* from the statutory remedies, the

Gaudet Court then strove to conform the recovery permitted in a *Moragne* wrongful death action with the state wrongful death remedies. As the *Gaudet* dissent noted, the majority opinion rejected the Congressional purposes expressed in DOHSA and the Jones Act against awarding nonpecuniary damages, since neither Act, as interpreted, was supportive of the majority's opinion. *Id.* at 605-06 (Powell, J., dissenting). The rationale of applying a judicially created remedy to a statutory provision such as DOHSA is questionable, as this Court subsequently noted in *Higginbotham,* 436 U.S. at 625.

The *Gaudet* Court also speculated that permitting recovery of nonpecuniary damages under the *Moragne* wrongful death remedy would not subject the shipowner to double liability, since any possible overlap could be controlled by "application of familiar principles of collateral estoppel." 414 U.S. at 592. As noted in the dissent this would probably create more problems than it resolved, *Id.* at 608 (Powell, J., dissenting), and providing a decedent's family with a second opportunity to recover such subjective damages may well result in its receiving "substantially more than just compensation for its injuries." *Id.* at 609.

This Court has long been concerned with the correction of anomalies in a uniform body of Federal Maritime Law, especially in personal injury and death cases, and specifically with aberrations hinging upon the geographic location of the tort or injury. *Moragne* (398 U.S. at 395-96, and referred to in *Gaudet,* 414 U.S. at 576-77) attempted to resolve such anomalies, including "the strangest," that true seamen had no wrongful death remedy for unseaworthiness within territorial waters (citing *Gillespie* v. *United States Steel Corp.,* 379 U.S. 148 (1964)) whereas longshoremen, or surrogate seamen, do if permitted by applicable state

statutes. Therefore *Moragne* overruled *The Harrisburg*, 119 U.S. 199 (1886), to rectify this anomaly so that the rights of longshoremen, who had gradually been elevated to the status of seamen, would not be propelled beyond seamen in wrongful death cases.

It should be noted that the decision in *Higginbotham* also encouraged a geographically based anomaly. The Court was not unaware of such a result.

> "It is true that the measure of damages in coastal waters will differ from that on the high seas, but even if this difference proves significant, a desire for uniformity cannot override the statute." 436 U.S. at 624 (footnote omitted).

However, when the applicability of DOHSA in such a situation first faced this Court in *Higginbotham*, the *Gaudet* decision awarding loss of consortium damages had already been made. The decision in *Higginbotham* was compelled by the statutory language of DOHSA; the only manner in which to avoid any distinctions therein would have been to overrule *Gaudet*.

Herein the Court is faced with a different situation. Although certain distinctions are possible between death and injury, these differences are certainly more worthy of consideration than the callous dismissal of such anomalies in admiralty by the New York Court of Appeals below, as "a currently accepted fact of life." 46 N.Y.2d at 640-41, App. D at A14. In *Higginbotham*, the Court was confronted with the clear applicability of a statute compelling that a distinction be made. Here, the Court has the opportunity to avoid yet another anomaly by adopting, in a harbor worker's personal injury action, the Jones Act proscription against loss of consortium.

The *Gaudet* dissent also noted the concern expressed by Mr. Justice Harlan in his majority opinion in *Moragne* regarding the overruling of prior decisions. However, the Court concluded that *The Harrisburg* should be overruled as an "unjustified anomaly." *Id.* at 404. As the *Gaudet* dissent noted:

> "The substantive rule rejected today is no comparable anomaly. It has been the generally applied doctrine since wrongful-death actions were introduced in this country. It has been the rule of the relevant federal statutes since their inception, and Congress has not modified the rule during that entire period. It was the rule announced in *Mellon* [v. *Goodyear*, 277 U.S. 335 (1928)] and *Flynn* [v. *New York, New Haven & Hartford Railroad*, 283 U.S. 53 (1931)] *supra*, cases the Court chooses not to follow today. And, unlike the opinion in *Moragne*, the majority has not provided, in my view, sound reasons of precedent or policy for overturning the rule." 414 U.S. at 613 (Powell, J., dissenting).

Concerning geographic anomalies, the *Gaudet* dissent indicated the lack of uniformity which would be created by the majority decision, since the locale of the seaman's injuries would be determinative of his available remedy. *Id.* at 601. If the injury occurred on land, then a Jones Act suit would preclude a subsequent wrongful death action; however, if the injury occurred at sea, then *Gaudet* recovery would be permitted. Such a result, the dissent felt, also portended a subsequent overruling of the line of cases commencing with *Mellon* v. *Goodyear*, 277 U.S. 335 (1928), in order to remove such an anomalous result. *Id.* at 612-13.

The *Gaudet* decision, as interpreted and refined by *Higginbotham*, engenders a further geographically based

anomaly in maritime wrongful death actions. As specified in Point II, *supra,* nonpecuniary wrongful death recovery, such as loss of consortium, is proscribed by the Jones Act, FELA, and DOHSA; nevertheless, such damages may be recovered in a *Gaudet* General Maritime Law wrongful death action, if the injury causing death occurs within territorial waters. Such an anomaly has no proper place in the uniform body of Federal Maritime Law.

IV.

To Achieve Uniformity, Parity, and Fairness, Treatment Similar But Not Superior to Seamen Has Historically Been Afforded to Longshoremen.

This Court has often indicated its policy of uniformity regarding injuries to similarly situated persons on vessels, irrespective of their status as longshoremen or seamen. In *Seas Shipping Co.* v. *Sieracki,* 328 U.S. 85 (1946), a cause of action for unseaworthiness was created for longshoremen under the General Maritime Law. It was reasoned that the two classes of workers—seamen and longshoremen—engaged in a common pursuit for the shipowner, should be afforded the same protection under the law.

> "Running through all of these cases, therefore, to sustain the stevedore's recovery is a common core of policy which has been controlling, although the specific issue has varied from a question of admiralty jurisdiction to one of coverage under statutory liability within the admiralty field. It is that for injuries incurred while working on board the ship in navigable waters the stevedore is entitled to the seaman's traditional and statutory protections, regardless of the fact

> that he is employed immediately by another than the owner. For these purposes he is, in short, a seaman because he is doing a seaman's work and incurring a seaman's hazards. Moreover, to make the policy effective, his employer is brought within the liability which is peculiar to the employment relation to the extent that and because he also undertakes the service of the ship." *Id.* at 99 (footnote omitted).

Hence, this Court elevated the status of longshoremen to that of their seamen prototypes.

This Court has taken care to treat longshoremen and seamen equally or nearly so, but has avoided propelling longshoremen to a position beyond that of seamen.

> "On the one hand, it may be urged that *Sieracki* broadened the rights of shore workers; it gave them a seaman's status without depriving them of the right of action they had before they attained that status. On the other, it may be urged with equal reason that a longshoreman should not be able to 'play it both ways': be entitled, that is, to a seaman's remedy for unseaworthiness and also enjoy recovery from the shipowner for negligence which, prior to the Jones Act, was denied to a seaman. He would thus have available two non-statutory remedies to recover damages for his injuries, while the crew member, the true 'ward of admiralty,' has only one. And the fact that Congress in the Jones Act has given crew members a statutory cause of action for negligence hardly justifies this Court's according longshoremen alternative remedies, any more than we should now define the crew members' rights as including compensation under the Longshoremen's and Harbor Workers' Compensation Act." *Pope & Talbot, Inc.* v. *Hawn,* 346 U.S. 406, 417-18 (1953) (Frankfurter, J., concurring).

Similarly, Congress recognized the distinction between longshoremen and seamen when it first enacted the LHWCA in 1927. As that Act was originally drafted, its provisions included seamen; however, Congress acceded to the request of the seamen to be removed from coverage under the Act, as they preferred to retain their rights under the Jones Act. 68 Cong. Rec. 5402-03, 5410-11, 5414 (1927). *See also Calbeck* v. *Travelers Insurance Co.*, 370 U.S. 114, 124 (1962); *Nogueira* v. *New York, New Haven & Hartford Railroad*, 281 U.S. 128, 136 (1930). *See generally Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 256-65 (1977) (regarding the original LHWCA and the 1972 Amendments thereto).

As reaffirmed in *Moragne*, this Court will defer to Congressional enactments in similar areas, to determine the policy to be applied in determining rights and remedies. 398 U.S. at 392-93. Here, however, as differentiated from the situation presented in *Moragne*, Congress *has* provided an "affirmative indication of an intent to preclude the judicial allowance," *id.*, of loss of nonpecuniary damages in a maritime personal injury action—namely the preclusion of such recovery under the Jones Act, and the failure of Congress to change the result denying recovery to longshoremen when it adopted the 1972 Amendments to the LHWCA.

This Court has clearly adopted such reasoning in the past. In *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148 (1964), a seaman drowned within territorial waters, and the Court reaffirmed the rule of *Lindgren* v. *United States*, 281 U.S. 38 (1930) that the Jones Act provided the uniform, exclusive negligence remedy for such death, thereby obviating the applicability of state wrongful death statutes. In the majority opinion, Mr. Justice Black held:

> "Thirty-four years have passed since the *Lindgren* decision, and Congress has let the Jones Act stand with the interpretation this Court gave it. The decision was a reasonable one then. It provided the same remedy for injury or death for all seamen, the remedy that was and is provided for railroad workers in the Federal Employers' Liability Act. Whatever may be this Court's special responsibility for fashioning rules in maritime affairs, we do not believe that we should now disturb the settled plan of rights and liabilities established by the Jones Act." 379 U.S. at 155 (footnotes omitted).

Consideration should also be given to the *Igneri* rule precluding consortium recovery by the spouse of an injured longshoreman. That decision was rendered more than fifteen years ago by the Second Circuit, the "most experienced of admiralty courts." *Black Diamond Steamship Corp.* v. *Robert Stewart & Sons, Ltd.*, 336 U.S. 386, 393 (1949); *see also id.* at 403 (Jackson, J. dissenting); *Calmar Steamship Corp.* v. *Scott*, 345 U.S. 427, 433 (1953). The decision in *Igneri*, uniformly accepted and applied throughout the country until some questions were raised following *Gaudet* eleven years later, clearly denied recovery for loss of consortium to the spouse of an injured longshoreman. If Congress were not satisfied with such a result, it could have permitted recovery for loss of consortium when it amended the LHWCA in 1972, to remove both the shipowner's liability for unseaworthiness to longshoremen, and the concomitant right of the shipowner to implead the longshoremen's stevedore employer. *Igneri* had been decided nearly ten years previously, and at that time its validity had not been questioned.

Although this Court often fashions admiralty law, it will defer to the judgment of Congress, which "has para-

mount power to fix and determine the maritime law which shall prevail throughout the country." *Southern Pacific Co.* v. *Jensen,* 244 U.S. 205, 215 (1917). Since it may reasonably be assumed that Congress was satisfied with the *Igneri* interpretation denying consortium recovery to the spouse of an injured longshorman, this Court should therefore respectfully defer the legislative function to Congress, as it did in *Gillespie* regarding the Jones Act.

V.

Variation and Discrimination Would Destroy Uniformity In the Federal Maritime Law.

Exclusive admiralty jurisdiction is granted to the Federal District Courts pursuant to 28 U.S.C. §1333; however, that section also saves "to suitors in all cases other remedies to which they are otherwise entitled." It is settled law that although this statutory language permits an injured maritime worker to choose between bringing his suit in state or federal court, Federal Maritime Law will govern all such actions, wherever brought. *Garrett* v. *Moore-McCormack Co.,* 317 U.S. 239, 245-46 (1942); *Alvez* v. *American Export Lines, Inc.,* 46 N.Y.2d 634, 638, 389 N.E.2d 461, 415 N.Y.S.2d 979 (1979).

The uniformity doctrine in maritime law has its ultimate basis in the United States Constitution. Article III, Section 2 of the Constitution extends the judicial power "to all Cases of Admiralty and maritime Jurisdiction." As was long ago interpreted by the Court in *The Lottawanna,* 88 U.S. (21 Wall.) 558, 575 (1874), "the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country." Such a doctrine has been constantly reaffirmed in the area of mari-

time death and personal injury actions, as this Court stated in *Moragne* in justifying the rationale for establishing a maritime wrongful death cause of action. The Court, citing *The Lottawanna,* stated:

> "Such uniformity not only will further the concerns of both of the 1920 Acts but also will give effect to the constitutionally based principle that federal admiralty law should be 'a system of law coextensive with, and operating uniformly in, the whole country.'" 398 U.S. at 401-402.

State statutes are not applicable in areas where the "necessary consequences would be destruction of the very uniformity in repect to maritime matters which the Constitution was designed to establish . . ." *Southern Pacific Co.* v. *Jensen,* 244 U.S. 205, 217 (1917). Therefore, the availability or non-availability of a cause of action by a wife to recover loss of consortium for injuries to her husband under New York law, or under the law of any other state, is wholly irrelevant. *See, e.g., Igneri,* 323 F.2d at 259; *Davidson* v. *Schlussel Reederi KG,* 295 So. 2d 700, 701 (Fla. App. 1974). This was the uniform policy of the Federal Maritime Law which *Moragne* sought to create in regard to wrongful death remedies.

The New York Court of Appeals below acknowledged that Federal Maritime Law governed its determination of this issue (46 N.Y. 2d at 638-39, App. D at A10-A12), and then summarily disregarded the precedential authority of *Igneri* and *Christofferson* (discussed in Point I, *supra*). *Id.* at 641-42, App. D at A14-A16. The court tentatively set sail in what it considered to be uncharted waters and permitted recovery, thereby effectively scuttling the doctrine of uniformity in the application of Federal Maritime Law. The court below committed the error common to virtually all of

the decisions which declined to follow the *Igneri* rule denying consortium recovery. It relied on the subsequent changes in the common law, which now generally permits a wife's cause of action for loss of consortium. *See* 46 N.Y. 2d at 639-40, App. D at A12-A14. *See Doca* v. *Marina Mercante Nicaraguense, S.A.*, 474 F. Supp. 751, 757 (S.D.N.Y. 1979); *Hubschman* v. *Antilles Airboats, Inc.*, 440 F. Supp. 828, 858-59 (D.V.I. 1977); *Giglio* v. *Farrell Lines, Inc.*, 424 F. Supp. 927, 929-30 (S.D.N.Y. 1977), *appeal denied*, No. 77-8014 (2d Cir., Feb. 17, 1977); *Pesce* v. *Summa Corp.*, 54 Cal. App. 3d 86, 126 Cal. Rptr. 451, 454 (1975). However, as detailed in Part I (A), *supra*, although *Igneri* looked to the common law, it did not base its decision thereon; rather, it rested on the preclusion of such a cause of action to the spouse of a seaman under the Jones Act. As this Court noted in *Moragne*, admiralty law has always "been a thing apart from the common law . . . ow[ing] a much greater debt to the civil law." 398 U.S. at 386-87.

In relying on the subsequent changes in the common law permitting a wife's cause of action for loss of consortium in a non-maritime context, these courts raise an obvious red herring in the sphere of damages recoverable in maritime personal injury actions. It should be noted that no discrimination on the basis of sex exists in maritime personal injury actions.

> "Equality of the sexes is the rule in actions governed by maritime law. The spouse of a stevedore injured aboard ship is denied recovery for loss of consortium regardless of the sex of the stevedore." *Davidson* v. *Schlussel Reederi KG*, 295 So. 2d 700, 700-01 (Fla. App. 1974).

The only discrimination which could result in this situation, would be to permit the spouse of an injured longshoreman to recover for loss of consortium, even though the Jones Act clearly precludes such recovery to the spouse of an injured seaman. The prevention of such an anomaly regarding the damages recoverable in maritime personal injury actions was the specific goal of the Second Circuit in *Igneri*:

> "[O]ur duty to avoid capricious differences in treatment between similarly situated persons forbids our fashioning a rule that would place the spouse of a harbor-worker in a different, and better, position than the spouse of a seaman." 323 F.2d at 267.

Indeed, such an anomalous result would also be truly ironic in this case, inasmuch as respondent Alvez was regularly employed as a seaman, but happened to be moonlighting as a harbor worker at the time of his accident. (Statement, *supra*). Policy, fairness, and logic, clearly evince that such a result, as decided below by the New York Court of Appeals created an unnecessary and unfair distinction, and should be reversed by this Court.

CONCLUSION

It is respectfully requested that the decision of the New York Court of Appeals below be reversed, and the amended complaint not be permitted.

Respectfully submitted,

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IN THE
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October Term, 1979

No. 79-1

AMERICAN EXPORT LINES, INC.,

Petitioner,

v.

GILBERTO ALVEZ and
JOSEPH VINAL SHIP MAINTENANCE, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

RESPONDENTS' BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1

AMERICAN EXPORT LINES, INC.,
Petitioner,

v.

GILBERTO ALVEZ and
JOSEPH VINAL SHIP MAINTENANCE, INC.,
Respondents.

ON WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT

RESPONDENTS' BRIEF

Questions Presented for Review

1. May the wife of a harborworker seriously injured while working aboard a ship in the navigable waters of New York Harbor recover damages under the Maritime Law for loss of her husband's consortium?

2. Where there is lack of unanimity among the federal courts as to a question of Maritime Law, may the highest court of a state interpret that law in accordance with principles set

down by this Court, or is it bound to apply the law as set forth in an earlier decision of the Court of Appeals of the Circuit in which that state is located?

Statement

While working aboard petitioner's vessel in the territorial waters of the State of New York as a lasher, Gilberto Alvez was struck in the eye by a defective tension jack. He sustained serious injuries, including the loss of his right eye and a severe depressive reaction. He sought to amend his complaint to allege a cause of action on behalf of his wife, Juanita, for loss of her husband's consortium. This motion was denied by Special Term. On appeal, the New York State Supreme Court, Appellate Division, First Department, reversed on the law and granted the motion to amend the complaint.

The New York State Court of Appeals affirmed, permitting the cause of action of Juanita Alvez to be submitted to a jury along with that of her husband, based on a claim of both unseaworthiness and negligence.

Historical Background

The first reported case involving the question of recovery for damages for loss of consortium under the maritime law is *New York and Long Branch Steamboat Co. v. Johnson,* 195 F. 740 (3rd Cir. 1912), which permitted the husband of a passenger injured on a ship to recover damages for his wife's consortium. Fifty-one years later in *Igneri v. Cie de Transports Oceaniques,* 323 F.2d 257 (2nd Cir. 1963) the same remedy was denied the wife of an injured longshoreman. There had been no intervening decision of the Supreme Court, yet certiorari was denied (376 U.S. 949). The *Igneri* opinion relied on a decision of this Court in *The Harrisburg,* 119 U.S. 199.

Seven years after the decision in *Igneri,* in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), this Court broke

the shackles of *The Harrisburg* by declaring that in keeping with the liberal objectives of the maritime law it did have the power to expand the rights of maritime workers and their dependents. Having recognized the dynamic, flexible quality of the maritime law in *Moragne,* four years later this Court was called upon to decide whether the remedy for maritime wrongful death should include non-pecuniary losses such as loss of companionship and consortium, in *Sea-Land Services, Inc. v. Gaudet,* 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed. 9 (1974). Petitioner in that case argued that maritime law did not allow recovery for non-pecuniary losses. The case relied on by petitioner for that proposition was *Igneri*, the same case relied on by petitioner here. *Igneri* had held that diminution of the value of the husband's society and affections were elements too intangible to be measured by a jury. This Court rejected that view, citing with approval *New York and Long Branch Steamboat Co. v. Johnson, supra,* and *Benedict on Admiralty*, 366 (6th Edition 1940). *Igneri* was mentioned only as holding a contrary view.

At the time of the *Gaudet* decision, 27 out of 44 states which had passed on the question allowed recovery for loss of the husband's society in personal injury cases, as opposed to 12 in 1963 when *Igneri* was decided. That majority has now swelled to 37 (A12-A13, Footnote 4).[1]

Both *Moragne* and *Gaudet* involved deaths which occurred within the territorial waters of a state. More recently, in *Mobil Oil Corporation v. Higginbotham,* 436 U.S. 618 (1978), this Court was confronted with the question as to whether to allow damages for loss of consortium and society where death had occurred beyond the three-mile limit. Recovery was denied on the basis that to allow such damages would run directly contrary to the Death on the High Seas Act, 46 U.S.C. 761, which allows damages only for pecuniary losses.

The *Higginbotham* opinions, both the majority one and the dissenting opinion of Justice Marshall, make it crystal clear that

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1. Numbers in parentheses refer to pages in Appendix.

loss of consortium and loss of society may be recovered for when the injury occurs within the three-mile limit, and that this determination, reached in *Gaudet,* followed both "the humanitarian policy of the maritime law" and the "clear majority of states," both of which favored recovery for loss of society. *Id.* at page 622.

After the *Gaudet* decision, a California appellate court was called upon to decide whether a longshoreman's wife should be permitted to recover damages for loss of consortium of her injured husband in *Pesce v. Summa Corp.,* 54 Cal. App. 3rd, 86, 926 Cal. Rptr. 451 (1975). The holding of that court succinctly stated:

> "Since we can perceive no logical, sound or reasonable basis to differentiate between the case where the husband is killed, as opposed to injured, in respect to the wife's entitlement to recover for loss of consortium, we conclude that Igneri has been overruled by Sea-Land Services as construed by Skidmore."

The Chief Judge of the United States District Court for the Southern District of Georgia, in passing on the same issue, stated:

> "I am unable to see the rationality of a rule that if a defendant's negligence causes death, consortium can be recovered by the widow, but where only injury results, a wife cannot. I perceive no difference in the nature of suits for wrongful death and for tortious injury justifying so bizarre and inconsistent a result. A wife may be damaged as much as a widow by the loss of her husband's society, affection, companionship and sexual congress." *Lemon v. Bank Lines, Ltd.,* 411 F.Supp. 677 (1976).

Shortly after the *Lemon* case was decided, the Court of Appeals denied the right of the wife of a Jones Act seaman to recover for loss of her husband's consortium, in *Christofferson v. Halliburton Co.,* 534 F.2d 1147 (5th Cir. 1976). Judge Lawrence interpreted this decision as requiring him to reverse

his determination in *Lemon,* even though Lemon was a longshoreman.

In August of 1976, Special Term denied Alvez' motion to amend his complaint so as to add a claim by his wife for loss of consortium, relying on *Igneri.* Thereafter, judges of the district courts in New York appear to have been about equally divided as to whether *Igneri* was overruled by *Gaudet.* Compare *Giglio v. Farrell Lines, Inc.,* 424 F.Supp. 927 (S.D.N.Y. 1977), appeal denied (2nd Cir., Feb. 17, 1977) with *Westcott v. McAllister Bros., Inc.,* 463 F.Supp. 1039 (S.D.N.Y. 1978).[2]

Summary of Argument

Three cases decided by this Court within the last ten years are dispositive of the issue as to whether the spouse of a gravely injured harbor worker may recover for lost consortium as a result of injuries sustained by her husband on territorial waters. These cases are *Moragne, Gaudet* and *Higginbotham.*

Moragne is important because it reaffirmed the duty and power of this Court to fashion remedies for those injured on navigable waters, and because it restated the long-standing policy of the maritime law to be liberal and humane, and to grant the remedy rather than deny it when not required to withhold it by established and inflexible rules. 398 U.S. at 387.

Gaudet is important because it, too, reaffirmed the solicitude of admiralty for those injured within its jurisdiction, and because it rejected the reasons assigned in *Igneri* for denying a recovery for loss of consortium of maritime employees.

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2. Other cases, reflecting a split of opinion both in the Second Circuit and elsewhere, are cited at pages 24-30 of petitioner's brief. For a most recent case allowing the remedy in the District of Maryland, see the scholarly opinion of Judge Kaufman filed on December 17, 1979, in the cases of Kozoidek v. Gearbulk Ltd., et al., Civil K-77-52; *Johnson v. Atlantic Container Lines, Ltd., et al.,* Civil K-78-164 and *Houston, et al., v. Murmansk Shipping Company,* K-78-1373.

Higginbotham is important because it reaffirmed the holding of *Gaudet* that the right to recover for loss of consortium does exist within the territorial waters, though not where death occurs on the high seas. Since longshoremen and harborworkers are seldom, if ever, injured or killed on the high seas, *Higginbotham* recognized a lack of uniformity between the rights of seamen's wives and that of longshoremen's and harbor workers'.

Contrary to petitioner's claim that affirmance here will destroy uniformity in the maritime law, the decision of the Court of Appeals in no way adds to the lack of uniformity already recognized to exist in *Higginbotham.* on the contrary, affirmance will tend to promote uniformity of remedy among those injured while working in territorial waters.

The petitioner's brief is less an assault on the holding below than it is an effort to turn back the clock of progress and overrule the decisions of this Court in *Gaudet, Moragne* and *Higginbotham.* Because of the broad scope and blunderbuss approach of petitioner's brief, certain of the arguments, such as that concerning parity of treatment between seamen and harborworkers, will be discussed briefly, though they are actually irrelevant after *Higginbotham.* On the other hand some arguments, clearly irrelevant, such as the attack on *Gaudet's* handling of a res judicata issue not present in this case, will be ignored, lest discussion further obfuscate the simple issue of the right of Juanita Alvez to recover for loss of consortium.

This brief will also reply to an argument raised for the very first time before this or any other court in the brief of respondent Vinal that Juanita Alvez claim is barred by 33 U.S.C. 833(a).

ARGUMENT

POINT I

THE DECISION OF THE COURT OF APPEALS FOLLOWED THE LAW AS SET FORTH BY THIS COURT IN *SEA-LAND SERVICES v. GAUDET,* 414 U.S. 573.

This Court in *Gaudet* clearly declared that recovery could be allowed under the maritime law for loss of consortium. If petitioner is to distinguish this case from *Gaudet,* it can only be on the basis that the law should somehow be different in a death case from that in a case where the injured person survives. Such cannot be correct, for the very reason that impelled this Court to hold as it did, not only in *Gaudet,* but in *Moragne* and *Higginbotham* as well.

In *Moragne* this Court, in holding that there was a right to recover for death in a case otherwise governed by the General Maritime Law, held that the *primary* wrong giving rise to the remedies was the injury caused to the decedent. Thus, the Court stated, 398 U.S. at pages 381-382:

> "Where existing law imposes a primary duty violations of which are compensable if they cause injury, nothing in ordinary notions of justice suggests that a violation should be non-actionable simply because it was serious enough to cause death. On the contrary, that rule has been criticized ever since its inception, and described in such terms as 'barbarous', e.g., *Osborne v. Gillett,* 8 L.R. Exch. 88, 94 (1873) (Lord Bramwell, dissenting); Pollock, *The Law of Torts* 55 (Landon ed. 1951);; 3 Holdsworth, *History of English Law,* 676, 677 (3rd ed. 1927). Because the primary duty already exists, the decision whether to allow recovery for violations causing death is entirely a remedial matter."

The Court went on to state that since the primary source was the injury to the person itself, whether the person lived or

died was only a matter of remedy deriving secondarily from the primary cause. It found no difficulty in altering the remedy so as to give, by necessary logic, the same remedy that would otherwise have been given in the event the injury were not fatal.

In *Moragne* the Court did not specify all the damages that would be recoverable by reason of the primary injury, but in *Gaudet* the Supreme Court stated specifically that included in the right of loss of society granted in a fatal case was the right to recover for the loss of consortium. Again, bearing in mind what was stated in *Moragne* this right could only exist as the right also existed in a non-fatal case. Indeed, as pointed out above, the petitioner in *Gaudet* argued that maritime law did not allow recovery for non-pecuniary losses, relying on *Igneri.*

Petitioner argues that *Gaudet*, since it involved wrongful death, has no applicability to maritime personal injury actions. This argument cannot withstand logical scrutiny. It is based on two sentences from the opinion of Mr. Justice Brennan, taken out of context, which are seized upon to support an argument that recovery for loss of society cannot occur in the absence of death. To evaluate the language of the opinion, it is necessary to consider the background of the case and the unique problems of *res judicata* which were involved. Gaudet, a longshoreman, sued during his lifetime for serious personal injuries, and recovered a substantial jury verdict. His wife was not a party to that suit. The holding of the Court of Appeals, *Gaudet v. Sea Land Services,* 463 F.2d 1331, 1333 was that the jury verdict recovered by Mr. Gaudet during his lifetime did not include damages done to others by his death, which had not yet occurred.

Mrs. Gaudet sued only for her husband's death. Her failure to claim damages for loss of consortium during her husband's lifetime was probably a decision consciously made so as not to weaken her collateral estoppel position. This proved to be sound strategy, for the Court of Appeals acknowledged that the majority rule bars the right to recover damages where decedent, at the time of death, could not have recovered for his injuries

(for example, where barred by a statute of limitations, a release, or a judgment). The Court of Appeals refused to follow this rule because many of the cases so holding were based on "survival-type" rather than "true" wrongful death statutes. It reasoned that *Moragne* created a "true" wrongful death cause of action wholly apart from and not extinguished by the decedent's previous recovery for his personal injuries (463 F.2d p. 1332).

It is against this background that the language of Justice Brennan in *Gaudet* must be considered. The statement so strongly relied on by petitioner at 414 U.S. 591-592 did not mean to imply that Mrs. Gaudet might not have had a right to sue for loss of her husband's society had he lived, but rather to emphasize that the husband could not by his action bar a right solely vested in his wife.[3] The entire tenor of the *Gaudet* opinion makes it clear that permitting recovery for loss of consortium where a longshoreman or harbor worker is killed while denying it when he is maimed would be utterly illogical and unjust. In deciding to allow recovery for lost consortium, this Court said, 414 U.S. 587-588:

> "Thus, our decision to permit recovery for loss of society aligns the maritime wrongful death remedy with a majority of state wrongful-death statutes. But in any event, our decision is compelled if we are to shape the remedy to comport with the humanitarian policy of the maritime law to show 'special solicitude' for those who are injured within its jurisdiction."

Similarly, the decision to permit the spouse of an injured longshoreman to recover damages for lost society is compelled by that same humanitarian policy to grant rather than deny the remedy. Furthermore, the decision puts the maritime law in harmony with the overwhelming majority of American jurisdic-

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3. 414 U.S. 582, footnote 8.

tions which have passed on the question, as well as the Restatement of Torts.[4]

It should be noted that in pre-*Igneri* cases cited by petitioner such as *Pruitt v. M. S. Rigoletto,* 211 F.Supp. 295, and in the *Igneri* case itself, reliance was placed in the lack of a right in widows of seamen to recover for lost consortium as an element of damages for wrongful death. In its brief, petitioner first asserts (point IA) that the decision in *Gaudet,* a wrongful death case, has no applicability to maritime personal injury actions. Almost the entire remainder of the brief is devoted to an attack upon the *Gaudet* decision, and a discussion of other wrongful death cases. The close relationship between the right to consortium of a widow and that of a wife is compellingly obvious. As noted above, the petitioner in *Gaudet* relied on *Igneri* for its argument, rejected by this Court, that the maritime law does not recognize a right to recovery damages for loss of society.

Post-*Igneri* cases which denied recovery for lost consortium for a seaman's death relied on *Igneri. c.f. Petition of United States Steel Corporation,* 436 F.2d 1256 (1970); *Smith v. Olsen & Ungelstad,* 324 F.Supp. 578 (1971); *Valitutto v. D/S I/D Garonne,* 295 F.Supp. 764 (1969), all cited in petitioner's brief. Put in simplest terms, the legion of death cases denying consortium recovery on the basis of *Igneri* have done so on the reasoning that there can be no recovery for loss of a right which did not exist during decedent's lifetime. Conversely, if recovery is permitted, as in *Gaudet,* the right must have existed during decedent's lifetime. That is not "convoluted reasoning" as suggested by petitioner. It is logic.

As stated by this Court in *Moragne,* 398 U.S. at p. 406:

> "In most respects the law applied in personal injury cases will answer all questions that arise in death cases."

4. Section 693, comment d, page 496 Restatement of Torts, Second.

Furthermore, the decision in *Gaudet* refuted the various policy arguments offered to support the denial of all actions for loss of consortium, and thus indicated a general acceptance by this Court of this type of damage, without regard as to whether for personal injury or death.

POINT II

THE DOCTRINE OF *IGNERI* IS NO LONGER VALID LAW

If the common law changes, and if those changes are not inconsistent with the humane and liberal characteristics of maritime law, then maritime law, too, should change. This was the rationale of this Court in *Moragne,* when it said, 398 U.S. at p.388:

> "We need not, however, pronounce a verdict on whether *The Harrisburg,* when decided, was a correct extrapolation of the principles of decisional law then in existence. A development of major significance has intervened, making clear that the rule against recovery for wrongful death is sharply out of keeping with the policies of modern American maritime law. This development is the wholesale abandonment of the rule in most of the areas where it once held sway, quite evidently prompted by the same sense of the rule's injustice that generated so much criticism of its original promulgation."

Thus, in *Moragne,* this Court placed great weight upon changes in the attitude of state courts and state legislatures toward the remedy. The parallel in the present situation is inescapable. Judge Friendly left the door open for change when he said in *Igneri,* 323 F.2d at pp. 259-261:

> " . . . At least this much is true. If the common law recognized a wife's claim for loss of consortium, uniformly or nearly so, a United States admiralty court would ap-

proach the problem here by asking itself why it should not likewise do so; if the common law denied such a claim, uniformly or nearly so, the inquiry would be whether there was sufficient reason for an admiralty court's nevertheless recognizing one. [Citation omitted.] So we turn to the common law."

If the Second Circuit were to turn to the common law today, they would find a completely different picture from the one which confronted them 17 years ago when *Igneri* was decided. Twenty-five more states have recognized a wife's right to recover for loss of her husband's society. New York, where Peter Igneri and Gilberto Alvez were seriously injured, is one of those states. *Millington v. Southeastern Elevator Co.*, 22 N.Y.2d 498.

Judge Friendly was greatly influenced by the fact that the decision in *Hitaffer v. Argonne*, 183 F.2d 811 (D.C. App. 1950) cert denied 340 U.S. 852 was not met with widespread acceptance, 323 F2d 260-261). His survey revealed that out of the thirty-one American jurisdictions that considered the issue since *Hitaffer,* only twelve followed its precedent. Moreover, Judge Friendly misperceived this trend and considered it an indication that the common law considered consortium an anachronism (*id* at 264), and that the path to equality for women would be to meet a husband's claim as well.

He was also concerned that actions for consortium were "parasitic in nature," (*id* at 263) "too personal, intangible and conjectural to be measured in pecuniary terms by a jury" (*id* at 264) and finally that they were susceptible to double recovery. This Court concluded contrary to Igneri that the above fears were unfounded. Their inquiry disclosed that juries are quite capable in assessing the proper amount of damage[5] and in the

5. 414 U.S. at 589. The majority convincingly noted in support that juries had already been called upon to determine damages in such nebulous areas as pain and suffering for emotional injuries. Furthermore, juries have assessed damages for loss of consortium since the seventeenth century.

event of an overgenerous jury appellate tribunals would control excessive awards. Furthermore, *Gaudet* noted that the threat of double recovery was not realistic since each cause of action, the one for the injury and the other for the loss of consortium, were separate and independent. Clearly, each of the above arguments are equally applicable in actions for fatal as well as non-fatal injuries.

Petitioner's brief makes the startling assertion that Judge Friendly's decision to deny benefits to the wife of an injured longshoreman was based (exclusively) on analogy to the preclusion of a cause of action for loss of consortium by the spouse of a seaman under the Jones Act (p. 15). The reason for such a desperate argument is clear. That is the only basis of the Ignieri decision which has not been eroded away either by the subsequent changes in the common law or by the decision of this Court in *Gaudet.* However, petitioner simply ignores crucial language from the opinion of Judge Friendly:

p. 259-260

"Although New York's denial of a claim by a wife for loss of consortium is thus in no way decisive, it does not follow that reference to the common law generally is without relevance. Maritime law draws on many sources; when there are no clear precedents in the law of the sea, admirably judges often look to the law prevailing on the land. See Gilmore and Black, Admiralty (1957) §§ 1-16. At least this much is true. If the common law recognized a wife's claim for loss of consortium, uniformly or nearly so, a United States admiralty court would approach the problem here by asking itself why it should not likewise do so; if the common law denied such a claim, uniformly or nearly so, the inquiry would be whether there was sufficient reason for an admiralty court's nevertheless recognizing one. Compare the Harrisburg, 119 U.S. 199, 213-214, 7 S. Ct. 140, 30 L. Ed. 358 (1886). So we turn to the common law."

p. 263-264

". . . With loss of services eliminated, the wife's recovery would involve only such elements as the diminution of the value of her husband's society and affection and the deprivation of sexual relations and the attendant loss of child-bearing opportunity—elements which, it is argued, are too personal, intangible, and conjectural to be measured in pecuniary terms by a jury . . . "

p. 265

"With the common law authorities so conflicting and the opposing arguments so nearly in balance, we turn to an inquiry whether the historic common law position or the Hitaffer result comports better with other relevant elements of maritime law."

p. 267

"If there were evidence that maritime law generally recognized a claim for negligent injury to such an intangible right, or if the common law clearly authorized a wife's recovery, the gravitational pull of such concepts with respect to the wife of a longshoreman might be stronger than that of the analogy to the statute denying such recovery to a seaman's wife . . . "

How, in the face of such specific language from the very case which it relies on to support its challenge of the decision of New York's highest court, can petitioner expect this Court to accept its argument that developments in the common law of the various states is "not applicable to the issues presently before this Court?" It is a desperate argument. Judge Friendly specifically noted that the prevailing common law should be considered, but he found that the prevailing common law did not follow *Hitaffer*. In the thirteen years since the wife's right to recover for loss of her husband's consortium was first enunciated by the Court of Appeals for the District of Columbia, on-

ly 11 states[6] had followed suit, whereas 19 others[7] who had considered the question since 1950 had refused. It had been rejected by the Court of Appeals for the State of New York, *Kronenbitter v. Washburn Wire Co.*, 4 NY 2d 524 (1958). It was not the view expressed by the *Restatement of Torts.* Finding no evidence that the common law clearly authorized a wife's recovery, he found no reason for an admiralty court's nevertheless recognizing one.

How different the situation is today. A wife's right to recover damages for tortious invasion of her consortium is now recognized by 36 of the 50 states, as well as the District of Columbia, the Virgin Islands, and the territory of Puerto Rico.[8] Only five states which have considered the issue still deny the remedy.[9]

Today the *Restatement of Torts,* Second, recognizes *Hitaffer* as the prevailing view, contrary to its position when *Igneri* was decided. See Section 693, comment d, page 496.

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6. Arkansas, Delaware, Georgia, Illinois, Iowa, Michigan, Missouri, South Dakota, Montana, Nebraska and Oregon.

7. Alabama, Arizona, California, Colorado, Connecticut, Florida, Kansas, Kentucky, Maryland, New Hampshire, New Jersey, New York, Oklahoma, Pennsylvania, South Carolina, Texas, Washington, West Virginia and Wisconsim.

8. The court below listed 34 states (A12-A13, Footnote 4). In addition, Hawaii, *Nishi v. Hartwell,* 473 P 2d 116 (Sup.Ct. of Hawaii 1970); Puerto Rico, *Gonzales v. Fireman's Fund Ins. Co.,* 385 F.Supp. 140 (D.C. Puerto Rico 1974); Virgin Islands, *Hubschman v. Antilles Airboats, Inc.,* 440 F. Supp. 828 (1977). *Connecticut, Hopson v. St. Mary's Hospital,* ____A2d____.

9. Kansas, South Carolina, Washington, West Virginia and Louisiana.

POINT III

THE COURT OF APPEALS WAS NOT BOUND TO FOLLOW *IGNERI*, BECAUSE IT IS NOT CONTROLLING FEDERAL LAW TODAY.

Thirty-eight years ago this Court was called upon to decide whether or not a cause of action for maritime personal injuries survived the death of the tort feasor, where the tort occurred within the territorial waters of a state whose law permitted survival of causes of action for personal injuries. In holding that the principle of non-survival was not so strongly entrenched in the maritime law to compel ignoring the state law, Chief Justice Hughes observed:

> ". . . With respect to maritime torts we have held that the State may modify or supplement the maritime laws by creating liability which a court of admiralty will recognize and enforce when the state action is not hostile to the characteristic features of the maritime law or inconsistent with federal legislation . . . . " *Just v. Chambers,* 312 US 383, 388, 61 S. Ct. 687, 691.

Assuming arguendo that *Moragne* and *Gaudet* did not overrule *Igneri,* what did this Court have to say about the general policy of the maritime law?

> "It better becomes the humane and liberal charcter of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules." *Sea-Land Services, Inc. v. Gaudet,* 414 US 573, 583. *Moragne v. States Marine Lines, Inc.,* 398 US 375, 387

Counsel for respondent and third-party defendant Vinal has suggested that the petition raises a first impression reverse *Erie R. Co. v. Tompkins,* 304 US 64 question. Under the doctrine of *Erie* federal courts must follow the decisions of a state's

highest court. In the absence of a ruling by the state's highest court, a federal court will be bound by the ruling of an intermediate court, unless there is persuasive evidence that the state's highest court would reject that ruling. *West v. American Telephone & Telegraph Co.,* 311 US 223 (1940), 61 S. Ct. 179. The opinion of the intermediate appellate court does not necessarily represent binding authority, even though the state's highest court has denied certiorari. *Graham v. White-Phillips Co.,* 296 US 74 (1935), 56 S. Ct. 15. Difficulty in determining what the state courts may thereafter determine the state law to be do not provide a reason for the federal court to deny jurisdiction. *Meredith v. City of Winter Haven,* 320 US 228 (1943), 64 S. Ct. 7.

When a federal court must determine state law, it should not slavishly follow lower court or even upper court decisions but ought to consider all the data the highest court of the state would use. *Roginsky v. Richardson-Merrell, Inc.,* 378 F 2d 832, 851 (2nd Cir. 1967), citing Corbin, *The Laws of the Several States,* 50 Yale L.J. 762 (1941). Even a determination by the highest court of a state need not necessarily bind a federal court, where later developments make it apparent that the decision no longer represents the law of the state. *Evans v. S. J. Groves & Sons Co.,* 315 F 2d 335, 341-345 (2nd Cir. 1963).

Finding a lack of unanimity among decisions concerning the question (A11) the court below properly examined the ratio decidendi of *Igneri* to see if it was still valid today (A12). In a careful and well reasoned decision, Judge Jason, speaking for the five member majority, employed logical analysis in justifying the court's departure from *Igneri* and *Christofferson.* He reasoned that the court was not bound by the older and more authoritative ruling in *Igneri* because subsequent developments had so eroded its theoretical underpinnings as to make it no longer valid law, and for the additional reason that the awarding of damages to a widow for loss of society had been approved by this Court in *Gaudet.* The lone dissent by Judge Jones was not based on any disagreement concerning the ultimate merit of

the majority's decision, but solely on the basis that the New York Court of Appeals did not have the power to rule otherwise than *Igneri* and *Christofferson,* which had been decided by federal courts. It was this conflict which counsel for respondent Vinal referred to as a reverse *Erie v. Tompkins* question.

The rationale underlying a federal court's freedom from mechanically following state court rulings is twofold. At least one commentator[10] has noted that unless federal courts are permitted to examine the same data a state court would examine when determining whether or not a relevant state court precedent reflects outmoded law, a litigant in a federal court would get second rate justice. It has further been observed that if federal courts were bound to apply a mechanical approach when determining state law, it would encourage forum shopping, since a litigant would know that in one forum there would be a strict adherence to stare decisis, whereas in the other the decision would be subject to the normal growth and development of the law. Frankfurter, The Supreme Court and the Erie Doctrine in Diversity Cases, 67 Yale L.J. 187, 212 (1957).

The analogy between the *Erie* doctrine and maritime law is readily apparent because common to both systems and paramount in each is the prevention of the development of a dual system of federal and state substantive law within a given jurisdiction. Further is the desire to prevent forum shopping, *Guaranty Trust Co. v. York,* 326 U.S. 99, 109, and to insure that litigants rights will not be determined by the courthouse in which the case is heard, *Garrett v. Moore-McCormack Co.,* 317 U.S. 239 (1942). Because of the similarities between the two systems, it would appear to be logical that state courts should be afforded the same degree of judicial discretion when applying federal maritime law as federal courts applying state law in diversity cases. Under this analysis, state courts should be permitted to examine rulings by the highest arbiter of maritime law, this Court, to determine whether or not the otherwise dispositive intermediate court ruling still reflects valid maritime law, although it has not been expressly overruled.

10. *Corbin, supra.*

Giglio v. Farrell Lines, Inc., supra, Kozoidek v. Gearbulk Ltd., supra note 2, Hubschman v. Antilles Airboats, Inc., 440 F. Supp. 828 (D.V.I. 1977) were all scholarly opinions by district court judges declaring after careful analysis that the *Igneri* holding is outdated and should not be followed. Are the judges who authored these opinions, simply because they wear the federal robe, to be permitted the luxury of logical analysis, while state court judges are restricted to blind and mechanical application of stare decisis? The answer must be no.

POINT IV

THE DECISION OF THE COURT BELOW DOES NOT UPSET ANY POLICY OF UNIFORMITY OF THE MARITIME LAW TO THE DETRIMENT OF JONES ACT SEAMEN

It is apparent that since the decision of this Court in *Higginbotham,* uniformity of the maritime law is an illusory goal where remedies for seamen and harbor workers injured or killed aboard ship is concerned. When a worker is killed beyond the three-mile limit, his survivors are restricted to pecuniary losses, but where death occurs within the territorial waters of a state the liberal doctrine of *Moragne* applies. This naturally favors the survivors of longshoremen and harborworkers, who work on the territorial waters. The decision in *Higginbotham,* however, did not signal a retreat from the traditional solicitude of the maritime law for those injured within its jurisdiction. it was compelled, said the majority, by the fact that Congress by statute had limited damages under the Death on the High Seas Act to "pecuniary loss."

Where a particular area of the maritime law is not preempted by statute, Congress has left to this Court the task of fashioning remedies under the maritime law. *Fitzgerald v. United States Lines Co.,* 374 U.S. 16, 20 (1963). Clearly, Congress has not enunciated any policy against the recovery of loss

of consortium by the wife of a living seaman or harbor worker. Petitioner's argument that Congress, by not changing the *Igneri* rule by legislation has in effect approved it *sub silentio*, was effectively and directly answered by this court in *Moragne*, 398 U.S. at 405:

> "To conclude that Congress, by not legislating on this subject, has in effect foreclosed, by negative legislation as it were, reconsideration of prior judicial doctrine would be to disregard the fact that 'Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law (citation omitted)"

One could as easily argue that since more than five years have passed since *Gaudet*. Congress has clearly approved of the result. The Congress acts only when people ask it to act. Theirs is a political process, depending to a great extent on who speaks to them with a loud voice. There are few to speak to them on behalf of injured maritime workers, many on behalf of shipowners. Wisely, they have left to this Court to stand as the bastion of the rights of all citizens where maritime matters are involved.

The substantive rights of seaman and of longshoreman have drifted apart in recent years, largely as a result of the 1972 amendments to the LHWCA, 33 USC 905 (b). No longer does a longshoreman or harborworker have the right to sue the shipowner for breach of the warranty of seaworthiness given to him by this Court in *Sea Shipping Co. v. Sieracki*, 328 US 85.[11]

11. Contrary to the assertion in petitioner's brief, there is no statement in the Sieracki opinion that the rights of longshoremen should never be greater than those of seamen. Indeed, one of the grounds of the dissenting opinion of Justices Frankfurter and Burton was that under the majority decision the non crew member would enjoy rights not accorded to members of the crew, for he would be entitled to indemnity under the warranty of seaworthiness plus benefits of the LHWCA not available to crew members, 328 US at 107.

For the blue-water seaman, on the other hand, the unseaworthiness doctrine has become the principal vehicle for recovery by seamen for injury or death, overshadowing the negligence action made available by the Jones Act. *Moragne v. States Marine Lines, Inc.*, supra, 398 US at 399.

The case principally relied on by petitioner for the proposition that wives of Jones Act seamen cannot recover for loss of their husband's consortium is *Christofferson v. Halliburton Co.*, 534 F2d 1147 (5th Cir. 1976), which involved injuries sustained by the husband while working as a seaman in Federal waters off the Louisiana coast. The decision was by a divided court, with a strong dissenting opinion. Rehearing was denied, with four judges dissenting, 542 F2d 1174.

Two things in particular are interesting to note about the majority opinion in *Christofferson*. The first is that in order to deny Mrs. Christofferson a remedy for loss of her husband's consortium, the majority found it necessary to declare that no such remedy exists under the law of Louisiana, (534 F 2d at page 1151). The implication is clear that had Christofferson been injured in New York, which permits a wife to recover such damages, Mrs. Christofferson would have been allowed to maintain her action.

The second aspect of the majority opinion in *Christofferson* which is of interest is that the court mentions its prior endorsement of *Igneri* in the case of *Canal Barge Co., Inc. v. Griffith*, 480 F 2d 1 (5th Cir. 1973),[12] a case decided after *Moragne* and before *Gaudet* in which the Fifth Circuit refused to allow damages for loss of consortium in a maritime wrongful death claim. Denial was based on *Igneri*, the Court stating, 480 F 2d at page 31:

> ". . . Igneri v. Cie de Transports Oceaniques, 323 F 2d 257, established that in actions under general maritime law to recover for personal injuries caused by both negligence and unseaworthiness, the spouse may not recover for loss of consortium, which was defined as 'the mutual right of the marriage partners to each other's society, companionship, and affection, including sexual intercourse' . . . "

There could hardly be a clearer statement that loss of consortium of a living spouse and that of a deceased one are inextricably interwoven. Before the appellate process was exhausted in *Canal Barge,* this Court handed down its decision in *Gaudet.* On rehearing, the Fifth Circuit remanded *Canal Barge* for a rehearing for determination of damages for loss of consortium, 573 F 2d 911 (1975).

The majority in *Christofferson* not only ignored the fact that their 1973 opinion in *Canal Barge,* which had relied so strongly on *Igneri,* was overruled by *Gaudet,* they stretched logic beyond its limits in rejecting appellants' arguments that *Igneri* had been shorn of its vitality by *Gaudet* and by the dramatic change in the common law over the intervening thirteen years. They quickly forgot how strongly they had relied on *Igneri* three years earlier in denying to a widow damages for loss of consortium. Instead, they seized upon two sentences from the *Gaudet* opinion, sentences quoted at pages 23-24 of petitioner's brief, as standing for the proposition that no right could arise for a wife to recover for loss of consortium until the injured longshoreman died.

The dissenting opinion of Judge Freeman quite accurately pointed out that the majority was reading too much into language which intended only to emphasize that the verdict which the deceased Gaudet had recovered before his death could not have encompassed those damages which were personal to the survivors. 583 F 2d at 1153-1154. The language in question, although incorporated in the *Gaudet* opinion immediately after the discussion of loss of society, probably refers more to accrual of the individual items of compensable loss included within that cause of action. Moreover, the Court's discussion of "loss of society" and decisions recognizing an independent action for "loss of consortium" indicates a clear awareness that the latter cause of action, if otherwise permissible, could clearly arise during the decedent's lifetime:

12. 534 F2d at page 1149.

> "Juries are often called upon to measure damages for pain and suffering, mental anguish in disfigurement cases, or intentional infliction of emotional harm. In fact, since the 17th century, juries have assessed damages for loss of consortium—which encompasses loss of society—in civil actions brought by husbands whose wives have been negligently injured. More recently, juries have been asked to measure loss of consortium suffered by wives whose husbands have been negligently harmed." 414 US at 589-590, 94 S. Ct. at 814.

The recovery for "loss of consortium" referred to clearly arises when husbands or wives are negligently "injured" or "harmed" and not merely when they are negligently killed.

INTEGRATION OF THE RIGHT TO RECOVER FOR LOST CONSORTIUM UNDER THE MARITIME LAW WITH THE LAW PREVAILING ON THE LAND

It would of course be ironic if the forward-looking and liberal remedy accorded to wives of those badly injured by a tortfeasor were to stop abruptly at the water's edge, in view of admiralty's traditionally liberal attitude toward those injured within its jurisdiction. More disruptive, however, would be the inconsistencies and confusion which can result from aplication of the *Igneri* rule. More and more, with the elimination of the protection of the warranty of seaworthiness, attorneys representing injured longshoremen and harbor workers are seeking new defendants on whom to fasten blame. Where latent defects of ship's gear or even of cargo-handling equipment provided by the stevedore causes injury or death, this formerly gave rise to a remedy against the vessel. *Petterson v. Alaska Steamship Co.,* 347 U.S. 396. Now, the only remedy for a latent defect will be a products liability claim against the manufacturer or suplier. Such a claim would be governed by state law, and as mentioned above under Point II, the overwhelming majority of states permit recovery for loss of a husband's consortium. Claims in the same suit are often asserted against the vessel owner and against

other defendants, such as manufacturers and suppliers and independent contractors. Consider the confusion in instructing a jury where different measures of damages apply against different defendants for the same injury.

Uniformity is promoted by bringing the maritime law in line with the *Restatement* and the clear majority of the states. Petitioner cites the case of *Consolidated Machines, Inc. v. Protein Products Corp.*, 428 F. Supp. 209 (MD Fla. 1976) as an example of "internal anomalies" created by *Gaudet*, asserting that the court permitted recovery for loss of society on behalf of those who died, while denying it to the spouses of those who were injured. This assertion (Petitioner's brief, p. 26) is somewhat misleading. Of the two living victims of the gas exposure, Parrish, who was seriously and permanently injured, was unmarried. The other man was not permanently injured, and the record is silent as to whether he was married or not. In any event, the court did not address the issue. Slightly altered, however, the fact situation points up the mischief created not by *Gaudet*, but by *Christofferson*. Since Florida has joined the overwhelming majority of states permitting the wife of a tortuously injured victim to recover damages for lost consortium, *Gates v. Foley*, 247 So. 2d 40, if Parrish had been married, his wife would have had the right to recover damages for lost consortium from the negligent designer of the fish processing plant, but not from her husband's employer. Such an anomalous result is avoided under the holding of *Alvez*. Similar factual situations frequently occur. cf. *Moll v. Southern Charters, Inc.*, 81 FRD 77 (EDNY 1979), cited by petitioner which contained three basic state law claims for relief, sounding in negligence, breach of warranty, and strict products liability.

RIGHTS OF WIVES OF JONES ACT SEAMEN

Petitioner claims that a Jones Act seaman's wife cannot recover for loss of consortium because, it argues, the Jones Act provides an "exclusive remedy" for such claims, and that act

provides for recovery only by "any seaman." In the first place, this argument ignores the seaman's remedy for injuries caused by unseaworthiness, *Mitchell v. Traveler Racer, Inc.*, 362 US 539 (1960), a remedy which has been recognized by this Court as "the principle vehicle" for recovery by seamen for injury or death. *Moragne, supra*, 398 U.S. at 399. In the second place, the "exclusive remedy" argument was rejected by this Court in *Maryland Casualty Co. v. Cushing*, 347 U.S. 409 (1954).

In the *Cushing* case, representatives of deceased crew members of a tug, seeking to avoid the financial restrictions of the Limitation of Liability Act, 46 U.S.C. 183, sued the employer's underwriters under §§655 of the Louisiana Insurance Code (the so-called "direct action" statute) relying on diversity jurisdiction. The district court dismissed on the ground that application of the statute would work material prejudice to the characteristic features of the general maritime law and contravene the essential purpose expressed by an Act of Congress in a field already covered by that Act. Addressing that argument, Justice Frankfurter said, 347 U.S. at 412:

> ". . . Nor need we be detained by petitioners' contention that as applied to claims against petitioners as underwriters of the charterer who employed the decedents, the State statute here conflicts with the Jones Act in that it would provide an alternative remedy where Congress has prescribed the means of recovery. Since that Act itself makes its remedy available to a seaman 'at his election' we perceive no conflict between the Jones Act and the Louisiana direct action statute"

See also *Just v. Chambers*, 312 US 383, where Florida was permitted to provide a remedy for death due to maritime torts in Florida waters, even though such a remedy was not permissible under maritime law and not available in some other states.

If, as argued by petitioner, the Jones Act provides no remedy for loss of consortium because of its use of the phrase "any seaman," such Act may not be construed to preclude a recovery for the wife of an injured seaman. This would explain

the fact that in *Jordan v. States Marine Corp.*, 257 F2d 232 (and in *Pruitt v. M.S. Rigoletto,* 211 F. Supp. 295) that there was no such right under the law of the state of the shipowner's incorporation. Perhaps it would also explain the finding in *Christoffersen* that the plaintiff wife had no right under the law of the state of Louisiana to recover for loss of consortium of her husband, although the opinion does not make clear whether the Louisiana law was considered because it was the state of defendant's incorporation or simply because it was the forum state. In the context of the instant case, it does not matter. Petitioner is incorporated in New York, the forum state which now recognizes such a right.

Surely, it cannot seriously be argued that the Jones Act, remedial legislation enacted to broaden the rights of seamen, was intended to stultify the growth of the general maritime law in a direction which would benefit seamen's wives. As this Court said in *Moragne* (referring to DOHSA):

> ". . . no intention appears that the Act have the effect of foreclosing any non-stationary federal remedies that might be found appropriate to effectuate the policies of general maritime law" 398 U.S. at 400

Thus, it can readily be seen that petitioner's assertion that the Jones Act proscribed any right on behalf of a spouse for loss of consortium is a completely unwarranted conclusion, just as was the assertion by the respondent in *Moragne* that Congress had proscribed any remedy for wrongful death in territorial waters other than the remedy provided by state wrongful death acts. Congress simply did not feel the need to legislate in that particular area sixty years ago. Today, an evolving and progressive common law—and maritime law—recognizes rights which did not exist long ago.

Furthermore, a strong case can be made that the Jones Act, a remedial statute which has traditionally been subject to liberal interpretation in favor of the seamen, is broad enough to encompass the seaman's spouse. One example of liberal construction is *Kernan v. American Dredging Company,* 355 U.S. 426, which involved a tugboat crew member killed as a result of the non-negligent violation of a Coast Guard regulation. Petitioner argued that the Jones Act was not the exclusive remedy for survivors of a seaman killed within territorial waters, and that she was entitled to the remedy of the state wrongful death act, which allowed recovery on the basis of unseaworthiness. Justice Brennan, writing for the majority, found it unnecessary to reach this question, holding that violation of a statutory duty even in the absence of negligence creates Jones Act liability.

The FELA, incorporated by reference into the Jones Act, clearly allows recovery where death is caused in whole or in part by the employer's negligence, or by reason of any defect or insufficiency, due to its negligence. Nevertheless, this Court took such language to include a non-negligent statutory violation, because:

> ". . . it is clear that the general congressional intent was to provide liberal recovery for injured workers. *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 508-510, 77 S. Ct. 443, 449-450, 1 L. Ed. 2d 493, and it is also clear that Congress intended the creation of no static remedy, but one which would be developed and enlarged to meet changing conditions and changing concepts of industry's duty toward its workers."

355 U.S. at 432.

In the light of the above expressed policy that the Jones Act is broad enough to include non-negligent statutory violations, is it not broad enough to embrace the spouse of an injured seaman?

POINT V

JUANITA ALVEZ' CLAIM IS NOT BARRED BY 33 USC 933(a)

Respondent Vinal, as third-party defendant, is allied in interest with petitioner on all issues involving damages. Obviously lacking confidence in petitioner's reliance on *Igneri,* Vinal asks this Court to reverse the New York State Court of Appeals on the basis of an argument never before advanced in this case, or, so far as can be determined, in any other. What is the basis of this remarkable argument? A section of the LHWCA entitled "election of remedies," enacted as an amendment in 1959 to relieve the employee from the burden of choosing between compensation and a third-party action, and a case, *Smither and Company, Inc. v. Coles,* 242 F2d 220 (D.C. App. 1957), which holds that the wife of an injured worker has no remedy against her husband's employer for loss of consortium as a result of a job-related injury. Neither the case nor the statutory section have any relevancy to the case at hand, where suit is brought against a third party. Without waiving any objection that the argument was not raised in the court below, a few comments would appear to be in order.

Though not clearly enunciated in Vinal's brief, the entire argument seems to rest on the premise that all rights of longshoremen and harborworkers (and their wives) derive from Congress. While this argument may have some validity where rights against the employer are concerned,[13] it is clear beyond cavil that the rights of longshoremen and harborworkers against the shipowner are rooted in the general maritime law. Although Congress, by enacting the LHWCA, cut off from longshoremen and harbor workers the right extended to them by judicial con-

13. But compare *Reed v. Yaka,* 373 US 412.

struction of the Jones Act to recover from their employer for negligence, they had not, until the enactment of 33 USC 905(b) in November 1972, been deprived of the protection given them with regard to the warranty of seaworthiness by this Court in *Sieracki* and in *Pope and Talbot, Inc. v. Hawn,* 346 U.S. 406 (1953).[14] cf. *Moragnel v. Moore-McCormack Lines,* 75 F. Sup. 969 (D. Md. 1948). The LHWCA was not intended to take away from the longshoremen the traditional remedies of the sea against the vessel owner. *Reed v. Yaka,* 373 U.S. 412, 413.

As originally enacted, the LHWCA required a longshoreman or harborworker to elect between receiving compensation and commencing a third-party action. The 1959 amendment, relied on by Vinal in an attempt to defeat Juanita Alvez claim, was enacted to broaden the workers' rights and eliminate the onerous burden of that election. The section has been interpreted by this Court as not barring a stevedore from recovering from the shipowner in negligence. *Marine Terminals v. Burnside Shipping Co.,* 394 U.S. 404 (1969).

The LHWCA was modeled on the New York employees' compensation statute. *Banks v. Chicago Grain Trimmers Ass'n,* 390 US 459, 466 (1968), which has a provision similar to 933(a).[15] Under it, an action against a negligent third party by a non-dependent child is not barred. *De Clara v. Barber Steamship Lines,* 309 N.Y. 620, 132 N.E.2d 871 (1956). Indeed, since the decision of the New York State Court of Appeals in *Millington,* actions have been allowed by wives of seriously injured workers against negligent third parties in New York. c.f. *Rocha v. State of New York,* 77 Misc. 2d 290, aff'd 45 A.D.2d 633 (1974).

Neither *Igneri* nor *Pruitt v. M.S. Rigoletto,* supra, nor any case relied on by petitioner in its fifty-six page brief even men-

14. Now replaced by the duty of the owner of a ship in navigable waters to all who are aboard for purposes not inimical to his interests to exercise reasonable care. *Kermarec v. Compagnie Generale Transatlantique,* 358 US 625.

15. New York State Workmen's Compensation Law, Sec. 29-1.

tions the statutory section which Vinal claims is dispositive of the right of a spouse to recover the damages which were denied in those cases. Either the statute was not considered relevant by the shipowner or by the court. In any event, it should not bar the right of Juanita Alvez to recover for the lost consortium of her husband Gilberto.

CONCLUSION

The decision of the court below should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. 79-1

AMERICAN EXPORT LINES, INC.,

Petitioner,

—against—

GILBERTO ALVEZ and JOSEPH VINAL
SHIP MAINTENANCE, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT JOSEPH VINAL SHIP MAINTENANCE, INC.

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BRIEF FOR RESPONDENT JOSEPH VINAL SHIP MAINTENANCE, INC.

Respondent Vinal is not dissatisfied with petitioner's presentation of references to opinions below and grounds on which this Court's jurisdiction is invoked.

Statute Involved

Section 33(a) of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1440, as amended 1959, 73 Stat. 391, 33 U.S.C. 933(a):

"If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person."

Questions Presented

I. If a harbor worker is tortiously injured aboard ship in U.S. territorial waters, does his wife have a general maritime law right to recover damages for her lost consortium resulting from her husband's non-fatal injury?

II. If a state court is required to answer the foregoing question and there is no controlling federal statute or decision by this Court, must the state court's answer be negative if that is the only previous answer by a federal court of appeals?

Statement

Respondent Alvez, a harbor worker, sued in New York County Supreme Court to recover damages from petitioner American Export Lines on general maritime law claims of negligence and unseaworthiness for injury which he sustained aboard petitioner's ship while docked in Brooklyn, N.Y. Petitioner impleaded Alvez' employer, respondent Joseph Vinal Ship Maintenance, Inc., for indemnity, the injury having occurred before the effective date of the

1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901, *et seq.*

Alvez moved to amend his complaint to allege a damages claim against petitioner for his wife's lost consortium resulting from his injury. The New York County Supreme Court denied the motion (A1) on authority of *Igneri v. Cie. de Transports Oceaniques,* 323 F. 2d 257 (2 Cir. 1963), cert. den. 376 U.S. 949 (1964), which holds that such a claim does not exist under general maritime law. The Appellate Division of the New York Supreme Court reversed the denial (A4-A5), relying on *Sea-Land Services, Inc. v. Gaudet,* 414 U.S. 573 (1974), which holds that the widow of a deceased harbor worker has a right to recover damages under general maritime law against a shipowner for lost consortium resulting from her husband's fatal injury aboard ship while in U.S. territorial waters, and on *Pesce v. Summa Corp.,* 54 Cal. App. 3d 86, 126 Cal. Rptr. 451 (2nd Dist. 1975), holding diametrically contrary to *Igneri,* which the intermediate California Court opined, 54 Cal. App. 3d p. 92, 126 Cal. Rptr., p. 455, "has been overruled by *Sea-Land Services* [*v. Gaudet*] as construed by *Skidmore"* [*v. Grueninger,* 506 F.2d 716 (5 Cir. 1975)], the latter holding that the husband of a motorboat passenger who was killed when the boat collided with a barge can recover damages for loss of his wife's consortium, neither citing nor having any occasion to distinguish *Igneri.*

The New York Court of Appeals affirmed the Appellate Division (A8-A17), one Judge dissenting (A17-A19), in the belief that "the *ratio decendendi* of the *Igneri* decision reveals an erosion of its theoreti-

cal underpinnings so severe as to precipitate its collapse under its own weight" (A12), citing as "the law of the land" (A15) a string of state court cases which recognize a wife's statutory or common law claim for lost consortium due to her husband's injury (A12-A13, n. 4) and *Sea-Land Services, Inc. v. Gaudet,* despite being "cognizant that the Fifth Circuit has interpreted *Gaudet (supra)* as limited to authorizing recovery for loss of consortium under the general maritime law to wrongful death actions" (A15), referring to *Christofferson v. Halliburton Co.,* 534 F. 2d 1147, reh. en banc den. 542 F. 2d 1174 (5 Cir. 1976), which on authority of *Igneri,* "the leading case on this question of law", 534 F. 2d p. 1149, holds that the wife of a seaman injured in U.S. territorial waters has no claim for lost consortium under the Jones Act, 46 U.S.C. 688, or general maritime law.

Summary of Argument

I. The wife's lost consortium claim is precluded by LHWCA § 33(a).

II. The New York courts were constitutionally bound by *Igneri.*

Argument

I

It is axiomatic that any right by Mrs. Alvez to recover damages for her lost cosortium is governed by federal maritime law, *cf., Chelentis v. Luckenbach S.S. Co.,* 247 U.S. 372, 384 (1918); that Congress enacted the Longshoremen's and Harbor Workers' Compensation Act in the exercise of its paramount, constitutionally derived maritime jurisdiction, *Northeast Marine Terminal Co. v. Caputo,* 432 U.S. 249, 256-260 (1977), and cases there cited; and that New York courts are bound by LHWCA § 33(a), *cf., New York Cent., etc. v. Tonsellito,* 244 U.S. 360 (1917); *Smither and Company, Inc. v. Coles,* 242 F. 2d 220 (C. of A., D.C. 1957), cert. den. 354 U.S. 914 (1957), which in the case "of a disability or death for which compensation is payable under this chapter", grants "the person entitled to such compensation" the right to recover damages against "some person other than the employer or a person or persons in his employ".

Thus, since Mrs. Alvez is not entitled to "such compensation" for her husband's non-fatal injury, *cf.,* LHWCA §§ 8, 9, she has no right to recover damages from petitioner for her lost consortium. A similar prohibition applies to consortium damages claims by spouses of non-fatally injured seamen because of precluding Jones Act language. *Igneri,* 323 F. 2d, p. 266; *Christofferson,* 534 F. 2d, p. 1149. As in *Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618, 623 (1978), "we need not pause to evaluate the opposing policy arguments. Congress has struck the balance for us."

"Here Congress has utilized its constitutional power 'to alter, qualify, or supplement' the maritime law 'as experience or changing conditions might require,' Panama R.R. Co. v. Johnson, 264 U.S. 375, 386, 44 S.Ct. 391, 393-394, 68 L.Ed. 748 (1924). Its action in doing so 'must not be read in a spirit of mutilating narrowness'; the courts must give '"hospitable scope" to Congressional purpose even when meticulous words are lacking.' United States v. Hutcheson, 312 U.S. 219, 235, 61 S.Ct. 463, 467-468, 85 L.Ed. 788 (1941). We can think of no reason why Congress, having ruled out a maritime claim against the ship for loss of consortium by the spouse of a negligently injured seaman, would wish the courts to construct one for the spouse of a negligently injured stevedore." *Igneri,* 323 F.2d, p. 267.

II

The New York Court of Appeals recognized that it was in the reverse *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938), situation of seeking the answer to a maritime law question "obtainable solely by recourse to Federal law" (A11). Under the analogous *Erie* doctrine, *cf.,* Friendly, In Praise of *Erie,* 39 N.Y.U.L. Rev. 383, 404-405, 407 (1964), the New York Court's function was "to ascertain and apply that law even though it has not been expounded by the highest court", and the New York Court "was not at liberty to reject those decisions merely because it did not agree with their reasoning", *Fidelity Trust Co. v. Field,* 311 U.S. 169, 177, 179 (1940), or free to apply "what it considered to be the better rule", *West*

v. A. T. & T. Co., 311 U.S. 223, 235 (1940), "in the absence of convincing evidence that the highest court * * * would decide differently." *Stoner v. New York Life Ins. Co.,* 311 U.S. 464, 467 (1940).

Contravening those mandates, the New York Court sought "any established and inflexible rule barring recognition of the claim before us" (A17). That convoluted search disclosed the only then reported, unmodified federal court decision which had refused to abide *Igneri,* on the ground of conjectured obsolescence, *Giglio v. Farrell Lines, Inc.,* 424 F. Supp. 927, 930 (S.D.N.Y. 1977), app. den. (2 Cir. No. 77-8014, 2/17/77), and the *Pesce* opinion, which the New York Court found more appealingly in accord with its own rationale in *Millington v. Southeastern Elevator Co.,* 22 N.Y. 2d 498, 293 N.Y.S. 2d 305 (1968), (A12-A13). The irony of any reliance on *Pesce* which, as previously noted, misconceived that *Igneri* had been overruled by *Skidmore v. Grueninger,* 506 F. 2d 716 (5 Cir. 1975), is that 7 months after *Pesce,* the Fifth Circuit Court of Appeals in *Christofferson* rejected the "argument that *Igneri* would now be decided differently" and distinguished its earlier decision in *Skidmore* on the ground that it "involved a wrongful death claim", 534 F. 2d, pp. 1150, 1151, n. 1.

Thus, even if LHWCA § 33(a) statutory maritime law did not prescribe Mrs. Alvez' general maritime law claim, instead of ascertaining the general maritime law by the analogous *Erie* rule so as to preserve the essential uniformity of that law and prevent the same sort of forum conflicts and consequent unequal protection of the law which motivated *Erie,* the New

York Court misguidedly searched for rogue opinions and declined to follow *Igneri* despite *Christofferson*, both of which it deemed to have been wrongly decided and eroded by "the law of the land". *Cf.*, the dissent (A17-A19).

Conclusion

The decision and judgment of the New York Court of Appeals should be reversed and the motion to amend the complaint should be denied.

Respectfully submitted,

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